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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 272

NORWEGIAN NITROGEN PRODUCTS COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

PETITION FOR CERTIORARI FILED AUGUST 1, 1932

CERTIORARI GRANTED OCTOBER 17, 1932

(36,969)

(36,969)

SUPREME COURT OF THE UNITED STATES

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INDEX

	Page
Proceedings in United States Court of Customs and Patent Appeals..	1
Petition for review	1
Assignments of error	1
Record from United States Customs Court	4
Stipulation as to record	4
Return to Court of Customs and Patent Appeals	5
Protest 92852-G/11125	7
Report of the collector	7
Answer to protest	8
Protest 128620-G/50885	8
Report of the collector	12
Answer to protest	13
Order transferring protest 92852-G	14
Order assigning cause	15
Notice of motion to dismiss protest 92852-G	16
Motion to dismiss protest 92852-G	17
Notice of appearance	18

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	Page
Stipulation as to hearing, etc	18
Statement of evidence	20
Appearances	20
Testimony of Sidney Morgan	21
Decision, Sullivan, J	37
Concurring opinion, McClelland, J	49
Dissenting opinion, Brown, J	52
Judgment	62
Exhibits:	
No. 1—Letter from Warren G. Harding to Thomas O. Marvin, October 6, 1922	62
No. 2—Executive order and rules of procedure before Tariff Commission	63
No. 3—Public notice of investigation by Tariff Commission.	67
No. 4—Public notice of hearing by Tariff Commission	69
No. 5—Proceedings before Tariff Commission, investigation No. 7, September 26, 1923	70
No. 6—Proceedings before Tariff Commission, investigation No. 7, September 10, 1923	82
Appearances	82
Testimony of C. F. Graff	85
Letter from J. D. Nevins to American Nitrogen Products Co., August 20, 1923	121
No. 7—Proceedings before Tariff Commission, investigation No. 7, October 6, 1923	146
No. 8—Brief of American Nitrogen Products Co. before Tariff Commission	160
No. 9—Summary of information compiled by Tariff Commission	163
Nos. 10 to 13, inclusive—Correspondence between Commission and De Vries & Doherty	176
No. 14—Letter from C. B. Slemp to Marion De Vries, April 21, 1924	192
No. 15—Letter from Marion De Vries to President, March 24, 1924	192
No. 16—Report of Tariff Commission to President of the United States	195
Argument and submission	199
Certificate of importance	199
Opinion, Bland, J	200
Judgment	213
Certificate re mandate	214
Clerk's certificate	214
Order allowing certiorari	215

United States Court of Customs and Patent Appeals

Customs Appeal No. 3454

NORWEGIAN NITROGEN PRODUCTS COMPANY,
Appellant,

vs.

THE UNITED STATES, *Appellee.*

Petition for Review.

To the Honorable the United States
Court of Customs and Patent Appeals:

The Norwegian Nitrogen Products Company, a corporation duly organized under the laws of the State of New York, the appellant above named, hereby applies to the United States Court of Customs and Patent Appeals for a review of the questions of law and fact involved in the decision and judgment of the United States Customs Court, First Division, dated April 21, 1931, overruling Protests 92852-G, etc., being and including all other protests included by and within the record of said case, the subject of said decision and judgment as by the said record shown, filed by the appellant, and complains of the following errors of law and fact involved in said decision and judgment.

Assignment of Errors.

1. That the said United States Customs Court erred in overruling said protests and every and all thereof.

2. That said United States Customs Court erred in not sustaining said protests and every and all thereof.

3. That said United States Customs Court erred in holding the testimony offered by appellant therein incompetent and irrelevant, or either incompetent or irrelevant, to the issue or the issues involved in the said case made as aforesaid.

4. That the said United States Customs Court erred in sustaining the objections of the Government to said testimony, or to any part thereof, and in granting the petition of the Government to strike out said testimony and any part thereof.

5. That the said United States Customs Court erred in affirming the judgment or decision of the Collector in each and every one and as to any part of said protests.

6. That the said United States Customs Court erred in holding and deciding that the Presidential Order increasing the rate of duty upon sodium nitrite, when imported into the United States, from three to four and one-half cents per pound, as shown by the evidence in said case and provided by the said Presidential order, was not an order entering into the rate or amount of duty as assessed by the Collector in each and all of the said cases subject to said protests, as provided in Sec. 514 of the Tariff Act of 1922.

7. That the said United States Customs Court erred in holding that said court was foreclosed from and did not have the legal right because of the Presidential order herein, or for any reason, of inquiry and decision whether or not the Tariff Commission had legally pursued the law in preparing and making its report to the President upon which said Presidential order was predicated.

8. That said United States Customs Court erred in not holding and deciding that the United States Tariff Commission had not legally pursued the law and duly promulgated regulations relevant to their procedure herein, and had not, therefore, made any legal or valid report in said matter to the President.

9. That said United States Customs Court erred in holding that the United States Tariff Commission was not

bound to pursue the law in its report to the President in order that the Presidential order should be legal and valid.

10. That the said United States Customs Court erred in holding that said protest or protests did not put in issue herein the legality of the Presidential order herein.

11. That the United States Customs Court erred in holding that any language or recital of the Presidential order herein did or could foreclose inquiry by said court into and decision thereby as to the legality of said order or jurisdiction or power of the President to make or proclaim the same.

12. That the said United States Customs Court erred in not holding and deciding that before the President had power or jurisdiction to make or proclaim said or any legal Presidential order, increasing said duties as aforesaid, there must have been submitted to the President a legal and valid report of said Tariff Commission made and submitted in pursuance of the law and the duly promulgated regulations of the President and the said Commission as to the procedure of said Commission.

13. That the said United States Customs Court erred in holding said report of said Commission valid or legal or in that in making the same the said Commission had not pursued the law and the Presidential order and its duly promulgated regulations.

14. That the said United States Customs Court erred in not holding said Presidential order illegal and void and that at the time of its making and proclamation the United States Tariff Commission had not submitted to the President a legal, valid, or in consequence any report upon said subject-matter to the President "according to law" or as by the law and said regulations required.

15. That the said report of the Tariff Commission made to the President was illegal and void.

16. That the said Presidential order and proclamation was illegal and void.

17. That said decisions of the Collector were, and each thereof was, illegal and void.

18. That the reason for the last three assignments of error is because in no one of the same had the statutory prerequisites thereto been had or made or exercised.

19. That said United States Customs Court had and has full and complete power and jurisdiction to review and decide all the foregoing issues and assignments of error.

20. That the said decision and judgment of the said United States Customs Court should be reversed and judgment herein rendered by this Honorable Court directing accordingly that each and all of the protests herein involved and the subject hereof be sustained.

Wherefore Appellant prays that said decision and judgment of said United States Customs Court be reversed and reviewed by this Honorable Court, and to that end the record and all papers and exhibits therein and relating to the protests thereby included be caused to be certified to this Honorable Court.

Dated Washington, D. C., June 8, 1931.

THE NORWEGIAN NITROGEN PRODUCTS COMPANY,
Appellant,
By DE VRIES, CRAWFORD & McCOOK,
Attorneys for Appellant.

Office and Post Office Address: 723 Southern Building, Washington, D. C.

Indorsed: United States Court of Customs and Patent Appeals. Filed Jun. 9, 1931. Arthur B. Shelton, Clerk.

Stipulation.

UNITED STATES CUSTOMS COURT.

Appeal 3454.

NORWEGIAN NITROGEN PRODUCTS COMPANY, *Appellant,*

v.

THE UNITED STATES, *Appellee.*

It is hereby stipulated by and between Charles D. Lawrence, Esquire, Assistant Attorney General of the United States, Attorney for the Appellee, and De Vries, Crawford & McCook, Attorneys for the Appellant, by and with the

approval of the Court, that the printing of the record may be diminished to the following extent:

That only that part of the stenographic record of the hearing before the United States Customs Court on page 27 marked "a", only that part on page 56 marked "a", and only that part on page 58 marked "b", together with all following shall be printed as a part of the record.

It is further hereby stipulated and agreed that all portions of said record, save the final orders of the Court and Judges thereof, relating to the transfer of said case from New York to Washington, D. C., for hearing may be omitted from the printed record.

It is further hereby stipulated and agreed that that portion of Exhibit 7, commencing with line 6, page 178, and extending to and including line 2, page 252, and all that portion of said Exhibit 7 commencing with line 9, page 255, to and including line 15, page 267, may be omitted from the printed record, proper designations of the omissions being noted in the printed record.

It is further hereby stipulated and agreed that any part or portion of the record which it is hereby agreed shall not be printed in the record may be used by either party in the oral argument of this case.

M. HIGGINBOTHAM,
For Assistant Attorney General,
Attorney for the Appellee.

DE VRIES, CRAWFORD & McCOOK,
By MARION DE VRIES,
Attorneys for the Appellant.

Dated at Washington, D. C., September 15, 1931.

Indorsed: United States Court of Customs and Patent Appeals. Filed Sep. 15, 1931. Arthur B. Shelton, Clerk.

Return to Court of Customs and Patent Appeals.

UNITED STATES CUSTOMS COURT.

Appeal 3454.

NORWEGIAN NITROGEN PRODUCTS COMPANY, *Appellant,*

v.

THE UNITED STATES, *Appellee.*

The petitioner above named, having applied to the United States Court of Customs and Patent Appeals for a review of

the questions of law and fact involved in a decision of the United States Customs Court in the above case, and the said Court having ordered this Court to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the United States Customs Court does hereby transmit to said Court of Customs and Patent Appeals the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following:

A copy of—

1. Protests 92852-G/11125 and 128620-G/50885 with the reports of the collector of customs and the United States appraiser's answers to protests.

2. The proceedings of November 8, 1928.

3. Motion and order to transfer hearing.

4. Motion to dismiss protest 92852-G.

5. Notice of appearance.

6. Stipulation of counsel.

7. The proceedings and testimony of November 24, 1930.

8. Exhibits 1 to 16 referred to in the testimony.

9. The decision in question, T. D. 44824, and judgment order.

The entry papers will be forwarded later.

Witness the Honorable Presiding Judge of the United States Customs Court this 1st day of July, A. D. 1931.

[SEAL.] J. W. DALE,
Clerk.

Tariff Commission hearing—Sodium nitrite.

Protest 92852-G/11125.

Copy.

8891.

Norwegian Nitrogen Products Co., Inc., 17 State Street, New York.

FEBRUARY 24, 1925.

Collector of Customs,
Custom House,
New York City.

DEAR SIR:

We hereby protest against your liquidation and assessment of duty at the rate of 4½¢ per pound on certain Nitrate of Soda ex S/S "United States" October 15th, 1924, entry No. 764654 liquidated on the 24th of February, 1925.

We claim that this merchandise is entitled to entry at the rate of 3¢ per pound under paragraph 83, Tariff Act of 1922, and that your action in assessing any other or higher rate of duty is illegal and without due warrant of law.

It is requested that all notices relating to this protest be sent to our attorneys, De Vries, Doherty, Davis & Lamb, 120 Broadway, New York.

Respectfully,
NORWEGIAN NITROGEN PRODUCTS CO., INC.,
T. LODRUP,
President.

Report of the Collector.

#11125.

MAY 4, 1925.

Respectfully referred to the Board of U. S. General Appraisers for decision.

The merchandise in question consists of sodium nitrate, entered Oct. 15, 1924.

Duty was assessed at 4½¢ per lb. in accordance with T. D. 40204 and Sec. 315a, Act of 1922. Note the Appraiser's special report, herewith.

The protest was received within the statutory time.

PHILIP ELTING,
Collector.

S.

Indorsed: Mar. 18, 1925. 11125. Norwegian Nitrogen Products Company, Inc. Nitrate of Soda. Entry No. 764654. Received Board of General Appraisers May 7, 1925. D. P. Dutcher, Chief Clerk. Received Custom House, New York, Feb. 26, 1925. The dates of entry, liquidation, and protest are correctly specified herein.

Answer to Protest.

United States Customs Service,

Appraiser's Office, Port of New York.

4/4/25.

Protest No. 11125.
Importer: Norwegian Nitrogen Products Co.
Invoice No.: —.
Entry No.: 764,654.
Date: 10/15/24.

The merchandise in question consists of sodium nitrite. It was returned for duty at the increased rate of 4½¢ per lb. in accordance with the President's proclamation, under Sec. 315 (*a*). Note T. D. 40204.

F. J. H. KRACKE,
Appraiser.

Ex.: BOWEN.

Protest 128620-G/50885.

Duplicate.

Collector of Customs,
(Address:) New York, N. Y.

SIR:

We hereby protest against your liquidation and assessment of duty at the rate of 4½ cents per pound on cer-

tain nitrite of soda ex (name of vessel:) S. S. Bergensfjord, (date:) 12/24/24, entry No. 811,852, liquidated (date:) 7/18/25.

We claim that this merchandise is entitled to entry at the rate of 3 cents per pound under paragraph 83, Tariff Act of 1922, and that your action in assessing any other or higher rate of duty is illegal and without due warrant of law.

That under and by virtue of paragraph 83 of the Tariff Act of 1922 the rate of duty upon sodium nitrite was and is 3 cents per pound; that under and by virtue of the provisions of Section 315 of the Tariff Act of 1922, the President of the United States is authorized and empowered to increase said rate of duty not to exceed 50 per centum, whenever he, the said President of the United States, shall ascertain and proclaim that the difference between the cost of production of sodium nitrite in the principal countries of exportation and that in the United States, is not equalized by the rate of duty prescribed by said paragraph 83, and shall ascertain and proclaim the rate of duty necessary to equalize said differences. That under and by virtue of said Section 315 of the Tariff Act of 1922, it is provided, that the United States Tariff Commission shall assist the President in said ascertainment and make due report to him under such rules and regulations as the President of the United States shall prescribe.

That on October 26, 1922, the President of the United States acting under and by virtue of said authority to promulgate rules and regulations for the enforcement of said Section 315, provided that, with reference to all requests, applications and petitions for action thereunder filed either with the President of the United States or the United States Tariff Commission, that such were thereby "referred to the United States Tariff Commission for consideration and for such decision as shall be in accordance with the law and the public interest under rules and regulations to be presented by such Commission."

Accordingly petition having been filed for an increase of the rate of duty upon nitrite, from 3 to 4½ cents per pound, the United States Tariff Commission proceeded to make investigation of said subject-matter and did make report thereupon to the President of the United States. In

and by virtue of the proclamation thereupon by the President of the United States, it is recited as follows:

> "Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence and to be heard;"

Your protestant alleges that contrary to the recital in the proclamation by the President, and as therein recited aforesaid, said Commission did not as provided by law and the rules of said Commission during said investigation or at any time give reasonable public notice thereof and did not afford interested parties appearing therein reasonable opportunity either to be present, or to produce evidence, or to be heard, as required by law and the rules of said Commission, wherefore the proceedings of said United States Tariff Commission were and are without authority of law and without jurisdiction and were and are null and void, and, wherefore, there was no investigation of said subject-matter made by said Commission as by the law and the regulations promulgated by the President and the said Commission required.

On the contrary, protestant further alleges that due request was made, and exception taken to the failure of the United States Tariff Commission, to accord this protestant duly appearing therebefore, reasonable opportunity to be present, to produce evidence and to be heard; that being overruled in said request due proceedings were initiated in the Supreme Court of the District of Columbia, to by law compel the said Commission to afford this protestant reasonable opportunity to be present, to produce evidence and to be heard in said proceeding; that while said proceedings were pending in court, and before final adjudication thereof, the said Commission in violation of the jurisdiction of said court, made report to the President of the United States whereupon the aforesaid proclamation was had and made.

Said proclamation of the President further recites concerning said alleged investigation by the United States Tariff Commission:

"And whereas the President *upon said investigation* of said differences in costs of production of said article wholly or in part the growth or product of the United States and of the like or similar article wholly or in part the growth or product of competing foreign countries, has *thereby* found that the principal competing country is Norway and that the duty fixed in said title and act does not equalize the differences in costs of production in the United States and in said principal competing country, namely, Norway, and has ascertained and determined the increased rate of duty necessary to equalize the same."

That your protestant further alleges as a ground for this protest, that upon the face of said proclamation, as was and is in truth and in fact the case, the President of the United States did not as required by Section 315 of the Tariff Act of 1922, himself make investigation into the aforesaid differences of cost of production of nitrite, and in truth and in fact, did not make any investigation whatever thereof as appears by said proclamation, and in truth and in fact, the only investigation made thereupon was by the United States Tariff Commission, and that the proclamation of the President of the United States shows upon its face that the sole and only investigation made of said differences was by the United States Tariff Commission, and that no investigation thereof was made by the President of the United States as by law required, wherefore your protestant alleges that said proclamation by the President of an increase of the rate of duty upon nitrite, from 3 cents per pound as provided in paragraph 83 of the Tariff Act of 1922, was not made in pursuance with the law, was without any jurisdiction whatsoever, and is invalid and void.

Your protestant further alleges upon information and belief as ground for his protest, that the United States Tariff Commission in its report to the President of the United States, which said report and that alone, the President of the United States followed as a basis of his proclamation, took into consideration in estimating the differences of cost of production of nitrite as required by said statute, illegal items, such as costs of transportation and

others, without any authority of law and contrary to the provisions of said Section 315 of the Tariff Act of 1922, wherefore the ascertainment and proclamation of the President of the United States was not made in pursuance of law, was made without jurisdiction of the said subject-matter, and without any jurisdiction whatsoever, and was void and of no effect and the due and only legal rate of duty upon sodium nitrite when imported into the United States is 3 cents per pound and no more.

We further claim that Section 315 of the Tariff Act of 1922, under which the rate of duty on nitrite of soda was increased by Presidential proclamation, from 3 cents per pound to 4½ cents per pound, is unconstitutional and void by reason of the fact that therein and thereby the Congress of the United States has endeavored to delegate to the President of the United States the constitutional power to lay and collect a tax, contrary to the terms and provisions of Article VIII, Section I, Subdivision I, of the Constitution of the United States.

It is requested that all notices relating to this protest be sent to us at our office: 26 Old Slip, New York City, New York.

Respectfully,

NORWEGIAN NITROGEN PRODUCTS CO., INC.,
Per T. LODRUP, *Pres.*

Dated Sept. 9th, 1925.

Report of the Collector.

November 23, 1925.

Respectfully referred to the Board of United States General Appraisers for decision.

Duty was assessed at the rate provided in the Tariff Act of 1922 for imported merchandise of the kind described in the entry or returned by the appraiser on the invoice.

Note the appraiser's special report, herewith.

The protest was received within the statutory time.

PHILIP ELTING,
Collector.

Indorsed: 128,620-G/50885. Norwegian Nitrogen Prod., Inc. Nitrite of Soda. 811,852—12/24/24. Received Custom House, New York, Sep. 17, 1925. The date of entry, liquidation, and protest are correctly specified herein. Received Custom House, New York, Sep. 17, 1925.

Answer to Protest.

United States Customs Service,

Appraiser's Office, Port of New York.

November 4, 1925.

AEL-G.
Protest No. 50885.
Importer: Norwegian Nitrogen Prod., Inc.
Invoice No.: —.
Entry No.: 811,852.
Date: 7/18/25.

The merchandise in question consists of sodium nitrite. It was returned for duty at the increased rate of 4½ cents per pound in accordance with the President's proclamation, under Section 315 (*a*), Act of 1922. Note T. D. 40204.

F. J. H. KRACKE,
Appraiser.

Ex.: BOWEN.

Proceedings Before the Customs Court.

U. S. CUSTOMS COURT, FIRST DIVISION.

Protest No. 92852-G.

NORWEGIAN NITROGEN PRODUCTS CO., *Plaintiff,*

vs.

THE UNITED STATES, *Defendant.*

Sodium Nitrite.

NEW YORK, November 8, 1928.

Before:

Associate Justice MCCLELLAND, presiding.
Associate Justice SULLIVAN.
Associate Justice BROWN.

Appearances:

De Vries & Davis, Esquires, attorneys for the plaintiff, by Marion De Vries, Esq., of counsel.

Charles D. Lawrence, Esq., Asst. Attorney General, attorney for the defendant, by James R. Ryan, Esq., special attorney, of counsel.

Samuel C. Hudnell, Court Reporter.

Mr. Ryan: At the request of Chief Justice Fischer, the court is informed that Chief Justice Fischer has taken the matter under advisement as to the motion to transfer this case to Washington.

Judge De Vries and I have agreed upon a continuance of this case to the December term, subject to the approval of this Court. It is further agreed that all the other cases on this docket on this subject excepting protest 92852-G, which will be the test case, may be suspended pending the final decision in protest 92852-G.

Justice McClelland: Protest 92852-G will be continued to the December term. All the others are ordered suspended pending the decision in protest 92852-G.

Motion and Order to Transfer Hearing.

UNITED STATES CUSTOMS COURT.

NORWEGIAN NITROGEN PRODUCTS CO., *Plaintiff,*

v.

THE UNITED STATES, *Defendant.*

Order Transferring Protest 92852-G, on Sodium Nitrite, to Washington, D. C., for Hearing.

A motion having been made herein by De Vries & Davis, Esqs., attorneys for the plaintiff, for an order transferring protests 92852-G, etc., to Washington, D. C., for hearing, and Chief Justice I. F. Fischer having heard Marion De Vries, Esq., counsel for the plaintiff, in support of the motion, and James R. Ryan, Esq., Special At-

torney for the Government, in opposition, and after due deliberation, and on November 20, 1928, having granted said motion and directed that the trial of the case be conducted before a full bench of the First Division of the Court on a day convenient to the members thereof, and that an order be entered accordingly.

It is therefore ordered that said motion be, and the same hereby is, granted, and that protest 92852-G be transferred to Washington, D. C., for trial before the First Division of this Court sitting in bank.

Witness Honorable I. F. Fischer, Chief Justice of the United States Customs Court, and the Seal of said Court, at the City of New York, this 20th day of November, A. D. 1928.

[Seal United States Customs Court.]

J. W. DALE,
Clerk.

UNITED STATES CUSTOMS COURT.

Protest 92852-G.

NORWEGIAN NITROGEN PRODUCTS CO., *Plaintiff*,

vs.

THE UNITED STATES, *Defendant*.

In the foregoing cause by an Order entered by Honorable I. F. Fischer, then Chief Justice of the United States Customs Court, on the 20th day of November, 1928, it was ordered that the foregoing cause be transferred to Washington, D. C., for trial before the First Division at such time as is convenient to the members thereof. It is therefore

Ordered, that said cause be placed on the docket for trial at Washington, D. C., on the 29th day of October, at 10.30 a. m.

It is further

Ordered, that the Clerk of the United States Customs Court notify each of the parties to his suit by sending them a copy of this Order.

Dated New York, October 1, 1930.

JERRY B. SULLIVAN,
Acting Chairman, Division One of said Court.

Notice of Motion to Dismiss Protest 92852-G.

UNITED STATES CUSTOMS COURT.

NORWEGIAN NITROGEN PRODUCTS CO., *Plaintiff*,

v.

THE UNITED STATES, *Defendant.*

Please take notice that upon the protest and the record heretofore made in the above entitled case, the undersigned, Charles D. Lawrence, Assistant Attorney General, attorney for the defendant, will appear before the United States Customs Court, First Division, at Washington, D. C., on October 29, 1930, at 10:30 A. M., or as soon thereafter as counsel can be heard, and move to dismiss the protest herein upon the ground that:

(1) A justiciable question is not presented herein upon which the judicial power of this court can act;

(2) The acts of the President, as Chief Executive of the United States, in issuing proclamation under and by virtue of the provisions of Section 315, Tariff Act of 1922, are not subject to judicial review;

(3) There is no provision of law conferring jurisdiction upon this court to review the acts of the United States Tariff Commission in connection with the merchandise involved herein;

(4) That the protest is insufficient for the reason that no provision of law has been pleaded or referred to, nor was the mind of the Collector directed to any provision of law, under which relief might be granted, as required by the rules of pleading applicable in customs cases, as enunciated by this court and the United States Court of Customs and Patent Appeals; and for such other and further relief as the Court may deem just in the premises.

Yours truly, etc.,

CHARLES D. LAWRENCE,
Assistant Attorney General.

UNITED STATES CUSTOMS COURT.

Protest 92852-G.

NORWEGIAN NITROGEN PRODUCTS CO., *Plaintiff*,

v.

THE UNITED STATES, *Defendant*.

Motion.

The United States, defendant herein, by its attorney, Charles D. Lawrence, Assistant Attorney General, upon the protest and the record heretofore made and all the papers in this case, hereby moves this Court for an order dismissing the protest herein and for such other and further relief as the Court may deem just in the premises.

The grounds upon which this motion is predicated and upon which defendant relies in support of the same are as follows:

(1) A justiciable question is not presented herein upon which the judicial power of this court can act;

(2) That the acts of the President, as Chief Executive of the United States, in issuing proclamation under and by virtue of the provisions of Section 315, Tariff Act of 1922, are not subject to judicial review;

(3) That there is no provision of law conferring jurisdiction upon this court to review the acts of the United States Tariff Commission in connection with the merchandise involved herein;

(4) That the protest is insufficient for the reason that no provision of law has been pleaded or referred to, nor was the mind of the Collector directed to any provision of law, under which relief might be granted, as required by the rules of pleading applicable in customs cases as enunciated by this court and the United States Court of Customs and Patent Appeals.

Respectfully submitted,

CHARLES D. LAWRENCE,
Assistant Attorney General.

JAMES R. RYAN,
Special Attorney, of Counsel.

Indorsed: Received Oct. 6, 1930, U. S. Customs Court. J. W. Dale, Clerk. W. H. T.

Notice of Appearance.

UNITED STATES CUSTOMS COURT.

Protests 92852-G, 128620-G, etc.

NORWEGIAN NITROGEN PRODUCTS CO., *Plaintiff*,

vs.

THE UNITED STATES, *Defendant*.

Sodium Nitrite.

We hereby enter our appearance as attorneys for the plaintiff in the above-entitled cause, transferred for hearing at Washington, D. C., on November 24, 1930, and request that we be given copies of all Orders and Notices concerning the same.

DE VRIES, CRAWFORD & McCOOK,
By MARION DE VRIES,
Attorneys for Plaintiff,
723 *Southern Building, Washington, D. C.*

Indorsed: Received Oct. 28, 1930, U. S. Customs Court. J. W. Dale, Clerk.

Stipulation.

UNITED STATES CUSTOMS COURT.

Protests 92852-G, 128620-G, etc.

NORWEGIAN NITROGEN PRODUCTS CO., *Plaintiff*,

vs.

THE UNITED STATES, *Defendant*.

Sodium Nitrite.

It is hereby stipulated and agreed by and between De Vries, Crawford & McCook, attorneys for plaintiff, and

Charles D. Lawrence, Assistant Attorney General, for and on behalf of the United States, defendant, subject to the approval of the Court, that the above-entitled cause, which, in so far as it relates to Protest 92852-G, was by Order of the Chief Justice, dated November 20, 1928, transferred to Washington, D. C., for trial, and by Order of Associate Justice Sullivan, Acting Chairman, Division One, dated October 1, 1930, was set for hearing at Washington, D. C., on October 29, 1930, at 10:30 A. M., shall now go over for hearing at the same place and hour on the 24th day of November, 1930; and that Protest 128620-G, involving the same class of merchandise and the same questions of law and fact, but which is more specific in its claims, be also transferred to Washington, D. C., for trial and set for hearing along with and at the same time as Protest 92852-G, the subject of the above-mentioned Orders.

It is further stipulated by the subscribing parties hereto that Protest 128620-G, if so transferred and set for hearing as hereinbefore stipulated, shall be subject in all respects to the Assistant Attorney General's Motion to Dismiss Protest 92852-G, of which Notice has heretofore been given, and to each and every ground set forth in said Notice as a basis for such Motion, in the same manner and to the same effect as if specifically included therein.

DE VRIES, CRAWFORD & MCCOOK,
By MARION DE VRIES,
Attorneys for Plaintiff,
723 *Southern Building, Washington, D. C.*
CHARLES D. LAWRENCE,
Assistant Attorney General,
Attorney for Defendant.

Approved.
JERRY B. SULLIVAN.

Indorsed: Received Port of Wash., D. C., Nov. 24, 1930, U. S. Customs Court. J. W. Dale, Clerk, by S. C. H., Reporter.

Proceedings Before the Customs Court.

U. S. CUSTOMS COURT, FIRST DIVISION.

Protests Nos. 92852-G and 128620-G.

NORWEGIAN NITROGEN PRODUCTS CO., *Plaintiff*,

vs.

THE UNITED STATES, *Defendant*.

WASHINGTON, D. C., November 24, 1930.

Before:

Judge McCLELLAND, presiding.
Judge SULLIVAN.
Judge BROWN.

Appearances:

De Vries, Crawford & McCook, Esquires, attorneys for the plaintiff, by Marion De Vries, Esquire, of counsel.

Charles D. Lawrence, Esquire, Assistant Attorney General, Customs Division, for the defendant, and James R. Ryan, Esquire, special attorney, associate counsel.

Judge McClelland: It is the view of the majority of the Court that the question, being of very great importance, and being raised for the first time before this Court, that we should take the motion under consideration, and defer action on it, but in the meantime to proceed to hear such testimony as the parties may desire to offer. Decision on the motion will be reserved.

Judge Brown: I wish to dissent from that order, because I think, in the first place, we ought to decide whether we have jurisdiction before we take any testimony.

* * * * * * *

Mr. Lawrence: If the Court please, I hope you will grant an exception to the Government, to your ruling

directing the taking of testimony on the merits. We feel, of course, that the jurisdictional question should first be determined.

Judge McClelland: The Government may have an exception to the ruling.

Mr. De Vries: I will call Mr. Morgan, the Secretary of the Tariff Commission.

Mr. Lawrence: Mr. Ryan will conduct the examination on behalf of the Government

SIDNEY MORGAN called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. De Vries:

Q. Will you state your full name? A. Sidney Morgan.

Q. And your official position? A. Secretary of the United States Tariff Commission.

Q. As such have you custody of the records? A. I have, sir.

Q. I have asked you to produce certain records, by *subpœna duces tecum,* here this morning. Have you produced them? A. I have, sir.

Q. I invite your attention first to the Executive Order of the President of the United States, dated October 7, 1922, directed to the United States Tariff Commission. Have you that order A. I have that document.

Mr. De Vries: We offer it in evidence.

Mr. Ryan: I object to the document. I admit its authenticity. It is immaterial and irrelevant to the issues herein.

Mr. De Vries: I assume that the Court will take judicial notice of an order of the President.

Mr. Ryan: Yes, I think it can. I object to it upon the ground that it is immaterial and irrelevant.

Judge Brown: Do we not take judicial notice of that?

Mr. De Vries: I think you do.

Judge Brown: Then it is not necessary to put it in the record.

Mr. De Vries: I suppose the Court wants all of these matters before it, and I am offering it in this record in order that the record will be complete.

Judge McClelland: Inasmuch as the Court has held that we ought to take judicial notice of it, it can be admitted. The objection is overruled.

Mr. Ryan: Exception.

By Mr. De Vries:

Q. Have you made a copy of that order, Mr. Morgan? A. That is the copy which was transmitted with the President's letter, of the order.

(A photostatic copy of the document was received in evidence and marked Exhibit 1, protest 92852-G, etc., of this date.)

By Mr. De Vries:

Q. Mr. Morgan, have you with you, as a record of the United States Tariff Commission, the rules adopted by the Commission, October 26, 1922? A. I have a copy of those rules (producing paper).

Mr. De Vries: I am not so sure, your Honors, that the Court will take judicial notice of the rules and regulations of the Tariff Commission, though I assume that it will.

Mr. Ryan: May it please the Court, the Government admits the authenticity of whatever it purports to be, of the paper, but objects to its admissibility on the ground that this Court is without jurisdiction in the premises, and that no evidence is admissible; and upon the further ground that the so-called Executive Order is immaterial and irrelevant to the issues herein, and it has no bearing upon them whatsoever; therefore it is inadmissible.

Judge McClelland: You are addressing yourself now to the rule?

Mr. Ryan: That is the rule. Your Honors are not bound by those rules, and it is immaterial.

Mr. De Vries: The Executive Order directed the United States Tariff Commission to proceed in accordance with the law, in accordance with the rules and regulations which it had promulgated. These are the rules and regulations which the Commission had promulgated.

Mr. Ryan: May it please the Court, I think Judge De Vries is losing sight of the fact that however the Tariff Commission might have proceeded, is a condition precedent, and that the President's proclamation stands.

Judge Sullivan: Ought we not to have one or two ultimate facts upon which our conclusion may be based, that the Court has or has not power. It seems to me that the admission of the rules does not in any way affect our ultimate judgment as to what may be the right or wrong in this case. I am in favor of the admission of the rules.

Mr. Ryan: I doubt very much, if your Honors please, that the Court has jurisdiction to admit anything.

Judge McClelland: The admission of the rules will not have any bearing on what the Tariff Commission did.

Mr. De Vries: No; but it is a law binding upon the Tariff Commission, as to how it shall proceed, and I assume that your Honors, in New York, have not that before you. Therefore, we need it in the record, so as to have it before you.

Judge McClelland: The objection is overruled.

Judge Brown: Record my dissent, for the reasons already stated.

Mr. Ryan: Exception.

Mr. De Vries: It is stipulated that a copy may be filed.

Mr. Ryan: No objection to that.

(The same was received in evidence and marked Exhibit 2, Protest 92852-G, etc., of this date.)

Sidney Morgan.

By Mr. De Vries:

Q. Mr. Morgan, as Secretary of the Tariff Commission, have you in your custody, and have you produced in court, in response to a subpœna, the application, or brief, of the American Nitrogen Products Company, of Seattle, for an increase of duty upon sodium nitrite, filed with the Commission on October 24, 1922? A. Yes, sir.

Q. Was such petition filed? A. It was.

Mr. De Vries: I will explain at this point, your Honors, that this is the petition which initiated this proceeding before the Tariff Commission, and I am only seeking to put in this record the fact that it was filed, because it is one of the documents which the Tariff Commission refused to show us, upon our appearance as interested parties.

Mr. Ryan: May it please the Court, we respectfully object to the receiving in evidence of the so-called petition of the American Nitrogen Products Company; first, upon the ground that your Honors are without jurisdiction in the premises; second, upon the ground that it has no bearing whatsoever upon the issues herein.

We differ with Judge De Vries that it initiated the proceeding before the Tariff Commission; and lastly, and most important, upon the ground that it is a confidential document showing confidential trade secrets, that, under the provisions of Section 708 of the Act of September 8, 1916, which is cited in 39 Stat., 798, U. S. C. Title 19, Section 105, page 530, cannot be given out.

Mr. De Vries: I am not asking that this petition be introduced in evidence. I am asking that the witness testify at the present time that there was such a petition filed, and nothing more.

Judge McClelland: It has not been offered.

Mr. De Vries: I am not going to try to put in evidence in this Court that which the Tariff Commission has withheld as confidential.

Judge Brown: Suppose there had been no petition filed, could not the proceedings have gone on just the same?

Mr. De Vries: I believe so, under the law.

Judge Brown: Do you think it is a pleading?

Mr. De Vries: That is an important legal question that would take some hours to discuss. I have always held that the Tariff Commission could not, of it own accord, proceed until the present act.

Judge Brown: You think it is like a pleading in a lawsuit?

Mr. De Vries: It is more or less so.

Judge McClelland: All you are doing now is seeking to show that such a petition was filed?

Mr. De Vries: Yes; and that we demanded a copy of it, and that demand was refused.

Judge Sullivan: What is wrong with filing the petition?

Mr. Ryan: We admit that the petition was filed, but we contend that it has no bearing on the case; we contend that it is immaterial.

Judge McClelland: You were proceeding to argue that it contains business secrets that ought not to be exposed.

Mr. Ryan: Judge De Vries has now changed his offer.

Mr. De Vries: No, I have not changed my offer. That is what I said in the first place.

By Mr. De Vries:

Q. Were there any supplementary petitions, amendatory thereof, filed with the Commission.

Mr. Ryan: I object to that as immaterial.

Mr. De Vries: I will explain this, your Honors; that the statements in these petitions, the original and the supplementary, were subsequently demanded by the Norwegian Nitrogen Products Company, the right to inspect them, and it was denied by the Tariff Commission. So, all we are trying to show here is that there was an amendatory petition filed, which, subsequently, we were denied the right to inspect.

Judge Sullivan: An answer to your question, by the witness, of yes, would be all you ask?

Mr. De Vries: That is all I ask.

Judge McClelland: You have it.

Mr. John F. Bethune, former secretary of the Tariff Commission (interposing): We have not been able to find since a day or two ago, when you requested us to look up these papers, any supplementary application.

Mr. De Vries: Nor briefs, Mr. Bethune?

Mr. Bethune: No paper similar to this paper.

By Mr. De Vries:

Q. As Secretary of the Tariff Commission, Mr. Morgan, and custodian of its records, have you with you an order of investigation of the foregoing petition, or petitions, adopted by the Commission on or about March 27, 1923? A. I have with me the file copy of the order for investigation, No. 7, effective the 27th day of March, 1923.

Q. Have you a copy of it? A. I have not a copy. I can furnish a certified copy for the record.

Mr. De Vries: We offer that in evidence.

Mr. Ryan: I object, upon the ground that your Honors are without jurisdiction in the premises, and upon the further ground that the order is immaterial.

Mr. De Vries: That order recites an investigation of this particular petition, which is necessarily jurisdictional to the subsequent hearing.

Judge Brown: That would tend to show that they had made an investigation, would it not?

Mr. De Vries: No. It shows that they were proceeding to make an investigation, Judge Brown.

Judge Brown: I am not indicating my dissent to the rulings on each question, because I thought I had particularly indicated in the beginning that it covered all of this line.

Mr. De Vries: What is the ruling of the Court?

Judge McClelland: What is this? An order directing an investigation?

Mr. De Vries: This is an order by the Tariff Commission, that the Commission would proceed to investigate this petition.

Judge McClelland: The Court is somewhat in doubt about just how far we ought to go. We will leave this subject to further consideration. Final decision is reserved.

Mr. Ryan: Exception.

(The same was received in evidence and marked Exhibit 3, Protest 92852-G, etc., of this date.)

By Mr. De Vries:

Q. Mr. Morgan, have you with you a notice of public hearing of the foregoing petition, or petitions, which was adopted by the Commission on July 20,, 1923, and published, giving notice to all interested parties to appear, and that when they appeared they would be afforded the right to be present, to produce evidence, and to be heard? A. I have with me the Commission's docket, file copy of the public notice of a hearing ordered by the Tariff Commission, in Investigation No. 7, on sodium nitrite, published on the 20th day of July, 1923.

Mr. De Vries: I offer in evidence a copy of the same.

Judge McClelland: The Court will receive this paper on the same conditions as the other (marked Exhibit 3). The Court is not prepared at this time to decide that it has jurisdiction to review the action of the Tariff Commission; and no final ruling of admission will be made at this time. If you desire to continue to offer these papers, the opinion of the Court will be reserved until we have time to look into this very important question.

Mr. Ryan: Counsel for the Government objects, solely upon the ground that the Court is without jurisdiction to receive any evidence—for lack of jurisdiction.

(The paper referred to was marked Exhibit 4, Protest 92852-G, etc., of this date.)

Sidney Morgan.

By Mr. De Vries:

Q. As Secretary of the Tariff Commission have you in your custody, and have you produced in court, the testimony taken in response to the notice of public hearing, at the time fixed by the Commission? A. I have, sir.

Mr. De Vries: We offer in evidence the testimony taken at that hearing.

Judge McClelland: In harmony with the last statement made by the Court, the ruling on the question of the admissibility of this testimony taken before the Tariff Commission, will be reserved.

Mr. Ryan: I wish to formulate an objection, not only upon the ground that the Court is without jurisdiction in the premises, as the question is non-justiciable, but on the further ground that if the Court possessed jurisdiction in the premises, that a record made before a mere investigating body is not proper evidence under the ordinary rules of evidence. It is not admissible on any ground.

Judge McClelland: The vital question is whether we have the power to review the proceedings of the Tariff Commission.

Mr. De Vries: If so, all of those proceedings should be before the Court, in justice to the Court. I have here copies of the official records.

Mr. Ryan: That matter has been disposed of.

Judge McClelland: The copies of the testimony before the Tariff Commission may be received instead of the original.

Mr. Ryan: I wish the record to show that the so-called documents are merely a stenographer's transcript of certain proceedings, or a portion of the hearing, and they do not constitute a record of the Commission.

Judge McClelland: They are offered for what they are.

Mr. De Vries: I can subpœna the stenographer who took these minutes, and I suppose, strictly speaking, that would be the proper evidence in the case.

Mr. Ryan: It is only a transcript, and it represents only a portion of what actually transpired.

Judge McClelland: The Secretary of the Tariff Commission has produced what he calls the original. I assume that what he calls the original copies were relied upon by the Commission.

Mr. Ryan: We are admitting the authenticity of the copies, but Judge De Vries has offered them as the transcript of the testimony before the hearing. It is only at best a very partial transcript. You are losing sight of my objection to it. There is a wide distinction between a stenographic transcript of a certain proceeding, or certain testimony which was taken, and the record of a proceeding before the Commission; and Judge De Vries has offered them as the records of a hearing on that particular day.

Mr. De Vries: A part of the record, in so far as it goes.

Judge Brown: You do not claim that the testimony taken at the hearing covers all the proceedings in the investigation, do you?

Mr. De Vries: No.

Judge McClelland: What do you say to that, Mr. Ryan?

Mr. Ryan: That is what I have been trying to get him to say for the last ten minutes.

Mr. De Vries: That is all I said.

Judge McClelland: It will be received.

(The same was received in evidence and marked Exhibits 5, 6, and 7, Protest 92852-G, etc., of this date.)

By Mr. De Vries:

Q. Mr. Morgan, it appears from the testimony taken on September 10, 1924, which has just been introduced in evidence, that at the opening of the hearings at that time demand was made of the United States Tariff Commission, that it supply the Norwegian Nitrogen Products Company, an interested party therein, opposing said petition, a copy of the petition which had been filed with the Commission by the American Nitrogen Products Company.

Have you a copy of the answer of the Commission to that request?

Mr. Ryan: I object, upon the ground that the Court is without jurisdiction in the premises, and upon the further ground that the testimony of this witness, that would tend to vary, or explain, or supplement whatever is before the Court, is inadmissible.

Judge McClelland: The question is whether he has it. He may answer Yes or No.

Mr. Ryan: I object to that. I think it is immaterial.

Judge McClelland: The objection is overruled.

Mr. Ryan: I note an exception.

A. I have a deleted copy of the application.

By Mr. De Vries:

Q. Have you the letter transmitting it to me, or to anybody in the case? A. I have a copy of a letter to De Vries & Doherty, transmitting a summary of information compiled by the Tariff Commission in connection with the pending investigation.

Q. That is not it. A. I have been reading from the wrong exhibit. The answer to the question is, we could find no copy of such letter transmitting——

Q. Have you a copy of the deleted petition, which was furnished upon application, in your files? A. We have a copy of the deleted application. Whether we furnished it to Mr. De Vries I do not know.

Q. You have no letter of De Vries & Doherty, dated September 11, 1923, requesting that we be supplied a copy of that petition? A. I do have a copy of a letter from De Vries & Doherty, dated September 11th, 1923, requesting the information just described.

Q. But you have no copy of your letter transmitting it, or of any letter of the Commission transmitting it? A. We have a copy of no letter transmitting the deleted application.

Mr. De Vries: In order to keep the record, in order, if your Honors please, to introduce these things in

their logical sequence, I would like to be sworn temporarily.

Mr. Ryan: We will accept Judge De Vries's statement, as a member of the bar of this court, we will submit——

Mr. De Vries: May I offer in evidence the deleted copy, which was received by De Vries & Doherty, in response to that demand?

Mr. Ryan: I will admit that it was received, but object upon the same grounds as heretofore, and on the further ground that it is immaterial to the case. It is an attempt to try to reopen a matter which is *res adjudicata.*

Mr. De Vries: This goes right to the gist of the matter. Being a so-called defendant in the Court I appeared before the Commission and asked, in pursuance of a public notice, a right to appear, and demanded a copy of the petition and complaint that had been filed, so to speak, against our client. That was refused, and a deleted copy thereof was furnished. This is the deleted copy which was furnished us.

That is one of the important points in this case.

Mr. Ryan: We do not concede, nor can we see that he was a litigant before the Tariff Commission, nor was he a party. He was merely there as many others were, or could have been, to inform the Commission, and to state and hear their views.

Judge McClelland: Were not they permitted to participate in the hearing?

Mr. Ryan: They did, but not as a party. There is no party before the Tariff Commission.

Mr. De Vries: We were an interested party, appearing in response to the public notice of the Commission, entitled under the law to be heard.

Judge McClelland: It seems as though they were properly before the Commission, but the question of the admissibility of the paper will be reserved.

Mr. Ryan: We do not agree with Judge De Vries's statement that his clients were a party in interest before that Commission. They were participants, but the hearing was in the public interest, to which the

public was invited, and he was only a part of the public.

Judge McClelland: I presume under the notice it was proper for any citizen to be present?

Mr. Ryan: That is true.

Judge McClelland: If he had anything to say he could say it.

Mr. Ryan: That is true. He was there in the capacity of a citizen, and so was his client.

(The paper referred to was received in evidence and marked Exhibit 8, Protest 92852-G, etc., of this date.)

By Mr. De Vries:

Q. Mr. Morgan, the testimony which has been received in evidence conditionally shows that at that time I demanded a summary of the information before the United States Tariff Commission, in order that I might be heard thereupon. I will show you a letter of the Secretary of the Commission, dated September 15, 1923, and ask you if you recognize that signature? A. I do. That is the original of a copy which we have in our official files.

Mr. De Vries: I offer that in evidence.

Mr. Ryan: I make the same objection, if the Court please.

Judge McClelland: The same ruling.

Mr. Ryan: Exception.

(The same was received in evidence and marked Exhibit 9, Protest 92852-G, etc., of this date.)

By Mr. De Vries:

Q. I show you a letter dated September 24, 1923, signed by Thomas O. Marvin, Chairman of the Commission, transmitting to De Vries & Doherty, in compliance with a request for certain rulings and information by the Commission, certain information; do you recognize the signature of the Chairman of the Commission?

Sidney Morgan.

Mr. Ryan: We admit that is Chairman Marvin's signature.

A. While I am not personally familiar with the signature of Chairman Marvin, I identify it as one issued by the Tariff Commission.

Mr. De Vries: We offer that in evidence.

Mr. Ryan: I make the same objection to the letter, though admitting the authenticity of the signature.

By Mr. De Vries:

Q. Have you in your files a letter from De Vries & Doherty, dated September 11, 1923, making a demand for certain information from the Tariff Commission, to which said letter of the Chairman of the Tariff Commission, Chairman Marvin, was an answer? A. I have in my possession, as a part of the official records of the Tariff Commission, a copy of your letter of September 11th, just referred to.

Mr. De Vries: I offer in evidence a copy of our letter, and the answer of the Tariff Commission thereto.

Mr. Ryan: I make the same objection, though admitting the authenticity.

Judge McClelland: The same ruling.

Mr. Ryan: I note an exception.

(The two papers just referred to were received in evidence and marked Exhibits 10 and 11, protest 92852-G, etc., of this date.)

By Mr. De Vries:

Q. Mr. Morgan, the testimony shows that at the hearing of September 26, 1923, before the United States Tariff Commission, De Vries & Doherty made a demand for certain rulings of the United States Tariff Commission, as to what records and documents they should have a right to inspect. I show you a letter, dated October 2, 1923, signed by Mr. Bethune, Secretary of the Tariff Commission, transmit-

ting to De Vries & Doherty a transcript of the minutes of the commission, which consisted of rulings made by the commission in response to that request, made by myself and for De Vries & Doherty. Do you identify that? A. I identify that as a part of the official correspondence of the Commission.

Mr. De Vries: We offer that in evidence.
Mr. Ryan: The same objection.
Judge McClelland: The same ruling.
Mr. Ryan: Exception.

(The same was received in evidence and marked Exhibit 12, protest 92852-G, etc., of this date.)

By Mr. De Vries:

Q. Mr. Morgan, have you, as Secretary of the Tariff Commission, in your possession, and have you produced it here in Court, in response to a subpœna, a letter of Marion De Vries, or from De Vries & Doherty, dated April 19, 1924, a copy of a letter which was addressed to the President of the United States, which was transmitted by letter to Chairman Marvin, of the United States Tariff Commission? A. I have such a letter with me (producing paper).

Q. Is there with it a copy of my letter? A. There is.

Q. Addressed to Mr. Marvin? A. Addressed to Mr. Marvin.

Mr. De Vries: I offer that letter in evidence.
Mr. Ryan: I make the same objection as before.
Judge McClelland: The same ruling.
Mr. Ryan: Exception.

(The same was received in evidence and marked Exhibit 13, protest 92852-G, etc., of this date.)

By Mr. De Vries:

Q. Mr. Morgan, have you in your files an acknowledgment of that letter, by the Chairman of the Tariff Commission? A. We could not find any such copy.

Mr. De Vries: That is all. May it please the Court, I produce a copy of a letter, dated March 24, 1924, addressed to the President, signed by De Vries & Doherty, upon the subject matter of the issuance of any proclamation upon this finding of the Tariff Commission, and the acknowledgment thereof by C. Bascom Slemp, Secretary of the President. I offer the same in evidence.

Mr. Ryan: We make the same objection.

Judge McClelland: The same ruling.

Mr. Ryan: Exception, please.

(The two papers referred to were received in evidence and marked Exhibits 14 and 15, protest 92852-G, etc., of this date.)

Mr. De Vries: I hold in my hand an official document, entitled, "United States Tariff Commission, Washington. Sodium Nitrite. Report of the United States Tariff Commission to the President of the United States. Differences in costs of production of sodium nitrite in the United States and competing foreign country, as ascertained pursuant to the provisions of Section 315 of Title III of the Tariff Act of 1922, with Appendix, Proclamation by the President; (dated) Washington, Government Printing Office, 1924."

I desire to offer the first page thereof, down to the words "Rates of duty," and the proclamation of the President therein contained, pages 21 and 22, in refreshment of the minds of the Court.

Mr. Ryan: I object, upon the ground that the Court can take judicial notice of the proclamation, and that upon the first page will have no bearing whatsoever on the issue.

Judge McClelland: The same ruling.

Mr. Ryan: Exception.

(The same was received in evidence and marked Exhibit 16, protest 92852-G, etc., of this date.)

Mr. De Vries: The plaintiff rests.

Mr. Ryan: The Government moves to strike out all the offers of documents, and all the evidence in this

proceeding, upon the ground that the Court is without jurisdiction in the premises, and therefore has not the power to receive any evidence whatsoever; and upon the further ground that, assuming, without conceding, its jurisdiction, which we deny, that the documents are inadmissible, as they tend to vary, or to impeach, or to explain a Presidential Proclamation, which is a better record of an official action required by law, and to which proclamation the law imputes absolute verity.

Judge McClelland: Decision on the motion will be reserved.

Mr. Ryan: May the Government have an exception in case your Honors rule against us?

Judge McClelland: You may have an exception.

Mr. Ryan: The Government rests.

Judge McClelland: Do you wish time for arguments or briefs?

Mr. De Vries: I would like to have 30 days after the testimony is transcribed, in which to file a brief.

Judge McClelland: You may have 30 days after the transcription of the testimony.

Mr. Ryan: The Government already has its brief in. The Government requests 15 days after the filing of the plaintiff's brief, in which to file any reply brief we may find necessary.

Judge McClelland: I will grant the Government 15 days' additional for a reply brief, if desired.

Decision of the Customs Court.

U. S. CUSTOMS COURT, FIRST DIVISION.

(T. D. 44824.)

Protests 92852-G/11125 and 128620-G/50885 Against the Decision of the Collector of Customs at the Port of New York.

NORWEGIAN NITROGEN PRODUCTS CO.

v.

UNITED STATES.

(Decided April 21, 1931.)

SULLIVAN, *Judge:*

The merchandise involved in these protests is described by the appraiser as "sodium nitrite."

On September 21, 1922, Congress enacted a tariff act under which this merchandise was classified and in paragraph 83 thereof provided a duty thereon of 3 cents per pound.

Afterwards, and under date of May 22, 1924, by Presidential proclamation under section 315 (*a*), Tariff Act of 1922, the duty on sodium nitrite was increased to 4½ cents per pound. T. D. 40204, 45 Treas. Dec. 642.

The collector therefore assessed the merchandise in question at 4½ cents per pound under paragraph 83 in accordance with the President's proclamation.

The plaintiff contests the validity of this assessment, claiming the merchandise is dutiable at only 3 cents per pound under paragraph 83.

The reasons therefor are stated in Protest 128620-G in a more extended pleading than in Protest 92852-G. It is alleged that the increased rate of duty was based on a Presidential proclamation, the basis for which was the report of the Tariff Commission, and that the plaintiff was not afforded an opportunity to cross-examine witnesses, nor to inspect testimony taken by the Commission; that by reason thereof the acts of the Tariff Commission were and

are without authority of law and therefore null and void; that the investigation of the subject matter by the commission was contrary to law and the regulations promulgated by the President and thereby insufficient to aid the President in the conclusion expressed in the proclamation.

Protest 128620-G further alleges that in addition the President, as required by section 315 of the Tariff Act of 1922, did not himself make an investigation into the conditions of the cost of production of nitrite, nor, in fact, make any investigation; and that the increase in rate from 3 cents to 4½ cents per pound was not made in accordance with law and is therefore invalid and void.

It is further alleged that, under section 315, the method by which the rate of duty on nitrite of sodium was increased by the President was unconstitutional and void "by reason of the fact that therein and thereby the Congress of the United States has endeavored to delegate to the President of the United States the constitutional power to levy and collect a tax, contrary to the terms and provisions of Article VIII, section 1, subdivision 1, of the Constitution of the United States."

It is therefore claimed the correct rate of duty is 3 cents per pound under paragraph 83 of the Act of 1922.

At the opening of the trial the Government moved to dismiss the protests, alleging in substance (1) that a justiciable question was not presented; (2) that the acts of the President in issuing proclamation under and by virtue of the provisions of section 315, Tariff Act of 1922, are not subject to judicial review; (3) that there is not any provision of law conferring jurisdiction on this court to review the acts of the United States Tariff Commission in connection with the merchandise involved herein; (4) that the protest is insufficient for the reason that there is not any provision of law pleaded or referred to, nor was the mind of the collector directed to any provision of law under which relief might be granted, as required by the rules of pleading applicable to customs cases.

This motion was held in abeyance by the court. Testimony was offered subject to the objection of the Government that it was incompetent, immaterial, and irrelevant to any issue in this case. The testimony was taken subject to such objection.

First. The issue involved in this case may be stated as follows:

(*a*) Did the collector assess this merchandise in accordance with the law in force at the time of such assessment?

(*b*) May the court review the proclamation of the President of the United States expressed in T. D. 40204, *supra*, and ascertain upon what facts the President based his conclusion?

The proclamation may be summarized as follows:

That the United States Tariff Commission made an investigation to assist the President in ascertaining the differences in the cost of production of, and all other facts and conditions enumerated in section 315 with respect to sodium nitrite, specified in paragraph 83 of the Tariff Act of 1922; and that reasonable notice was given of said investigation and the hearing in respect thereto "at which parties interested were given a reasonable opportunity to be present, to produce evidence and to be heard"; that "the President, upon said investigation of said differences in cost of production of said article wholly or in part the growth or product of the United States and of the like or similar article wholly or in part the growth or product of competing foreign countries, has thereby found that the principal competing country is Norway and that the duty fixed in said title and act does not equalize the difference in costs of production in the United States and in said principal competing country, namely Norway, *and has ascertained and determined* the increased rate of duty necessary to equalize the same"; and "that the increase in the rate of duty shown by said ascertained differences in said costs of production necessary to equalize the same is as follows:

An increase in said duty on sodium nitrite from 3 cents per pound to 4½ cents per pound.

The proclamation (T. D. 40204, *supra*) is based on the provisions of section 315 (*a*) of the Tariff Act of 1922, which provides—

> That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever

> the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in dassifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. * * *: *Provided,* That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act or in any amendatory Act.

The question presented by this record is whether or not the collector allowed the law in the assessment of duty on the merchandise involved. On that proposition the court has jurisdiction of the subject matter and the parties and therefore may determine whether or not the judgment of the collector was correct.

Jurisdiction and judicial power are not synonymous terms.

The provisions of this act have been declared constitutional. See Hampton *v.* United States, 276 U. S. 394.

While it is pleaded in the case at bar that the act is unconstitutional, yet we are relieved of investigating this contention by the following which occurred at the trial:

> *Judge Brown:* You claim here that the act is unconstitutional. * * * You have abandoned that claim?
>
> *Mr. De Vries* (Plaintiff's counsel): Surely. I would never have asserted it. As a matter of fact, I argued the other way. I drew the statute. Why would I assert that it was unconstitutional?

Second. Did the President's proclamation increasing the rate of duty on sodium nitrite become a verity to the extent that the facts upon which it is based and the con-

clusions arrived at can not be questioned in this proceeding?

The proclamation establishes the following facts:

(*a*) There was a hearing before the Tariff Commission in accordance with the provisions of section 315.

(*b*) All parties, including the plaintiff, were present at such hearing.

(*c*) The Commission made a report of its findings to the President.

(*d*) The President exercised his judgment on the facts, whether or not the existing rate of duty on sodium nitrite was sufficient to equalize the differences in cost of production in the United States and in Norway, and determined the increased rate of duty necessary to equalize such costs.

(*e*) In arriving at his conclusion he could consider other facts than those presented by the Commission.

(*f*) He proclaimed his conclusion increasing the rate from 3 to 4½ cents per pound.

It is evident that in arriving at such conclusion and proclaiming it he was merely executing an act of Congress. He was the mere agent of the lawmaking department to ascertain and declare an event upon which its expressed will was to take effect.

As shown by this case the act of the President in arriving at the conclusion he did can not be inquired into by this court.

It is evident from a reading of the statute that the President is not confined to an investigation by the Tariff Commission.

Plaintiff's counsel at the hearing admitted this, for it is stated at page 48 of the minutes:

> *Judge McClelland:* Is it your view that the President is limited to the report that he received from the Tariff Commission?
>
> *Mr. De Vries:* He is not, your Honor.

The fact that he may disregard the conclusion of the Tariff Commission further accentuates the proposition that an inquiry can not be made into the circumstances or facts upon which the proclamation is based.

The principal contention of the plaintiff is based on the proposition that he did not have such hearing before the Tariff Commission as provided by law; that the refusal by the Commission to permit plaintiff to see the testimony taken by the Commission, or more closely to cross-examine the witnesses, was such an abridgment of his rights as to render the report of the Commission futile.

While this contention is interesting it is not convincing. We are not interested in the procedure of the Commission. We are only interested in the fact that a hearing was had. What the President did is the vital fact. Did he follow the law? If so, all inquiry ends. It is the President's act that we are to consider, as he created the rate of duty upon which the collecter acted. It is then the question: Did the collector follow the law? It is from the collector's action that the plaintiff appeals, not from the procedure before an aid to the President.

The proclamation speaks the ultimate result of the conclusion of the President. The method pursued by a legislative body in the enactment of a statute can not be inquired into. The statute speaks the ultimate result attained by the legislature.

It logically follows that the statute and proclamation are immune from attack as to the methods by which the result was attained.

The President was not required to follow the findings of the commission. He may have used his independent judgment. He may have had other aids, such as personal investigation and commerce reports. In any event it was the President who found the difference. It was the President who proclaimed such findings. It was the President who acted and declared the law. It was the collector who assessed the duty, and it is the action of the collector that is at issue.

Third. Section 514 of the Tariff Act of 1922 specifies when and under what circumstances decisions of the collector may be contested, as follows:

> All decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, * * *

shall be final and conclusive upon all persons, unless the importer * * * shall * * * file a protest in writing * * *.

The only order applicable to the collector in this case is the proclamation of the President of the United States, for it entered into the rate of duty chargeable to the merchandise. The collector was not interested in what occurred before the Tariff Commission. He did not receive a single order or declaration therefrom pertaining to his duty. The collector received an order signed by the President of the United States declaring the proper rate of duty on sodium nitrite to be 4½ cents per pound. The collector could not question that order any more than this plaintiff. The collector did not have any connection with what took place before the Tariff Commission. He was not interested in the proceedings nor bound by any report they might make. The Commission did not report to the collector but to the President of the United States, and the President's action became as binding upon the collector as any part of the tariff law of the United States.

It therefore necessarily follows that, the law being constitutional, the proclamation became irrevocable and not subject to an attack for want of power or procedure in arriving at the conclusion stated therein.

A very interesting case on this subject is United States *v.* Chemical Foundation (Inc.), 272 U. S. 1. That was an action brought by the United States to set aside sales whereby patents, copyrights, etc., seized as enemy property, were transferred to the defendant by the Alien Property Custodian. It was alleged that the Government did not have power to make this transfer and that the proclamation of the President, directing it through his representative, Frank L. Polk, was void as being without authority on the President's part and that it was permissible to go behind the proclamation and ascertain the facts with reference thereto.

The law empowering the President to act is set forth in Section 12 of the Trading With the Enemy Act whereby enemy property was taken over by the Government of the United States.

It is not necessary to set forth the various paragraphs of that act. They are quoted in the cited cases. However,

we will quote the following proviso in the act as set out on page 9 of the opinion:

> *Provided,* That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, *unless the President* stating the reasons therefor, in the public interest *shall otherwise determine:* * * * [Italics ours.]

Here was authority given the President to make sale of property without advertisement or to others than the highest biddder.

It was provided that "the President may exercise any power or authority conferred by this act through such officer or officers as he shall direct." It appears Frank L. Polk was appointed with all the power conferred upon the President by the provisions of Section 12 of said act.

That the acts of the President were not legislative is clearly enunciated on page 12 of the Chemical Foundation case, *supra,* as follows:

> The determination of the terms of sales of enemy properties in the light of facts and conditions from time to time arising in the progress of war was not the making of a law; it was the application of the general rule laid down by the act. When the plenary power of Congress and the general rule so established are regarded, it is manifest that a limitation upon the excepted class is not a delegation of legislative power. Field *v.* Clark, 143 U. S. 649, 692; Buttfield *v.* Stranahan, 192 U. S. 470, 496; Union Bridge Co. *v.* United States, 204 U. S., 364, 377; United States *v.* Grimaud, 220 U. S. 506, 516.

The order empowering Frank L. Polk, as agent of the President, to make a sale, stated:

> I hereby vest in Frank L. Polk all power and authority conferred upon the President by the provisions of Section 12 * * *.

It was contended that such authority could not be delegated by the President to another, but the court stated:

> The contention that power to determine how enemy property should be sold could not be delegated to another is not sustained. This court has had occasion to consider a like question in Central Trust Co. *v.* Garvan, 254 U. S. 554, 567; Stoehr *v.* Wallace, *supra,* 244, and Commercial Trust Co. *v.* Miller, 262 U. S. 51, 53. These decisions sustain the delegation here involved.

In the case at bar there is not any attack upon the proclamation of the President of the United States increasing the rate. The attack seems to be on an independent body empowered by law to aid the President, that it did not permit the plaintiff to exercise certain rights during the hearing. We are not interested in that proposition, and this is not the tribunal wherein such contention can be advanced.

In the Chemical Foundation case, *supra,* with reference to the power of Frank L. Polk to act for the President and do the things designated, it is stated:

> And the validity of each of the orders made by Mr. Polk is attacked by the United States on the ground that it was too broad and constituted an attempt to give to the Custodian the very power granted to the President by the Act; that is, the power to determine that enemy properties should be disposed of otherwise than as specified in the proviso. But the contention can not prevail. Each of the orders sufficiently described the patents seized and authorized a private sale to the Foundation without advertisement. This was enough to indicate a determination to take these sales out of the class covered by the proviso. And it is insisted that the orders were induced by misrepresentation and were made without knowledge of the material facts. But both courts found that the United States failed to establish any conspiracy, fraud, or deception alleged.

How applicable is this statement to the case at bar. There is not a single allegation in the pleading or attempt to establish that any deception was used or any fraud to

induce the President to act as he did. We are not holding that if such facts were pleaded they would aid the plaintiff. We are not passing on that question. The fact remains that what came before the President was in the ordinary way, in the ordinary course, and his action was merely carrying out the law itself.

Under such conditions it is impossible to think for a moment that you may go behind this proclamation.

Fourth. There is some contention that the President is not immune from answering to the law for his acts, and therefore plaintiff may show that the President acted illegally and proclaimed what he was not empowered to do. This contention is unsound. In the first instance, the President, acting as he did, was not legislating. If he was his act is void. Congress alone may legislate. He did not have any discretion, except as to the rate. He did not create a law. He merely found a fact, viz, that there was a difference in the cost of production between the article produced in this, and the article produced in the competing country, and such difference instantly became the law of Congress without other act than proclaiming the fact. So that, in fact, at all times the law existed as now declared. It is therefore evident, if what the President did was in conformity to law, his act can not be impeached any more than an act of Congress. This theory is in consonance with the holding of the Court of Customs Appeals in the Hampton case and the Supreme Court of the United States in 276 U. S. 394. If he had acted beyond the law, that is, if he had increased the rate more than 50 per centum, then his act would have been void. It does not require any argument to sustain that proposition. The act would have been *ultra vires*. Therefore, the only question in causes of this nature is: Did the President act as the law empowered him? If so the controversy is ended. This rule is well stated in Clarke *v.* United States, 17 C. C. P. A. 420, T. D. 43866. There the question arose as to the right to contest a reliquidation ordered by the Secretary of the Treasury as to the value of the rupee, the currency of India, under the provisions of section 25 of the Tariff Act of 1894, continued in effect by the Tariff Act of 1913. That section provided that the value of standard coins in circulation in the various nations of the

world shall be estimated quarterly by the Director of the Mint and proclaimed by the Secretary of the Treasury. It then provided that the Secretary of the Treasury may order a reliquidation of any entry at a different value whenever satisfactory evidence shall be presented to him, showing that the value in United States currency of the foreign money of the invoice was at the date of certification at least ten per centum more than the proclaimed value. The court, in denying the right to go behind this order, held (pp. 422 and 423):

> Construing the language of the statute in the light of these several decisions, we conclude that authority for a judicial review of the findings of the Secretary and the action of the collector under such findings is limited to determining simply whether the order made is by its terms in conformity with the statute and whether the collector has correctly applied the law in making the reliquidation directed.
>
> * * * * * * *
>
> Giving to it the same construction which the Supreme Court gave to the language of the first portion of the section, it follows that if the finding of the Secretary, upon which the reliquidation is directed, shows upon its face that it conforms to the law, it is conclusive and binding and is likewise not subject to judicial inquiry as to its correctness, and if the collector's action conforms thereto it should be sustained.

It seems to us that the above authority—the latest expression on this question of our appellate court—being in harmony not only with authority but reason, precludes the plaintiff in the case at bar from going behind the return, namely, the proclamation of the President.

That the President's proclamation is sacred and can not be reviewed is further strengthened when we consider that his act was amplifying the law. There is not any allegation or attempt to prove that the rate provided is unreasonable; therefore, the rate can not be reviewed. As previously stated the President did not create a law; he merely declared an event upon which the law took effect.

This is well stated in the Hampton case, *supra*, where the Supreme Court said, citing Field *v.* Clark, 143 U. S. 649:

> * * * It was contended that this section delegated to the President both legislative and treaty-making powers and was unconstitutional. After an examination of all the authorities, the Court said that while Congress could not delegate legislative power to the President, this Act did not in any real sense invest the President with the power of legislation, because nothing involving the expediency or just operation of such legislation was left to the determination of the President; that the legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was merely in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.

We can not enlarge on this holding of the Supreme Court of the United States. It satisfies the mind that what the President did was merely to give expression to an act of the legislative body upon the happening of an event, namely, that there was a difference in the cost of production of the merchandise in the United States and the competing country.

As the act was held constitutional it necessarily follows that the method pursued by the agent of the law-making department in arriving at the fact of the difference in question can not be reviewed by the court but becomes a verity upon its proclamation.

We need not further elaborate on this question.

The collector having followed the law in force at the time of the assessment of duty, his judgment must be affirmed.

The testimony offered by the plaintiff is not only immaterial but incompetent to any issue involved. The objection thereto made by the Government is sustained, the motion to strike it out is granted, and an exception given to the plaintiff.

The Government's motion to dismiss the protests is denied, and an exception granted to the Government. The protests are overruled, and the action of the collector affirmed as to each protest.

J. B. S., *J.*

CONCURRING OPINION.

McCLELLAND, *Judge:*

I concur in the conclusion of Judge Sullivan that the protest herein should be overruled and the collector's assessment of duty affirmed.

I look upon the issue raised by the protests as being comparatively easy of solution. Any question of the constitutionality of the so-called flexible tariff provision, as embodied in section 315 of the Tariff Act of 1922, is expressly abandoned by counsel for the plaintiff as appears by the following in the record:

> *Judge Brown:* You claim the act is unconstitutional. Do you stand on that claim?
>
> *Mr. De Vries:* That was something put in there——
>
> *Judge Brown:* You have abandoned that claim?
>
> *Mr. De Vries:* Surely. I would never have asserted it. As a matter of fact I argued the other way. I drew the statute. Why would I assert that it was unconstitutional?

My attention has been directed to a recent decision by the Third Division of this court (in which Judge Brown participated) in the case of Fox River Butter Co. *v.* United States, T. D. 44667, wherein it was held by a majority of that division that the delegation of power granted by the Congress in section 315, *supra,* was unconstitutional, notwithstanding that the issue raised by the protest was neither an attack on the language of section 315, *supra,* or the constitutional right of the Congress to delegate to the President the power under the conditions and in the manner therein provided to change existing rates of duty. The plaintiff in that case in its protest simply stated its grounds of objection to the collector's assessment of duty on certain cheese in the following words:

> Protest is hereby made against your decision as to the rate or amount of duties chargeable on Swiss cheese and your assessment thereof at 7½ cents per pound or 37½ per centum ad valorem and your liquidation of the entries below named. The reasons for the objection, under the "Tariff Act of 1922," are that said merchandise is dutiable at 5 cents per pound but not less than 25 per centum ad valorem under paragraph 710, or in the alternative when assessed at 37½ per centum ad valorem at 7½ cents per pound. We further claim that the President exceeded his powers in issuing his proclamation on Swiss cheese because he is limited by law to proclaiming an increase in rate which will equal the difference in cost of production, and that such difference can not be one or the other of two sums, whichever is higher.
>
> We further claim that under the law he could only increase the rate in the enacting clause and not in the proviso, or at the appropriate rate according to the component material of chief value, provided such rate is not greater than the rate assessed, or at 10 per centum or 20 per centum ad valorem under paragraph 1459.

So far, therefore, as the protest discloses there was no intent on the part of the protestant to raise the question of the constitutionality of section 315 or part of it. It is true that counsel for the protestant do in their brief state—

> That section 315 is a delegation of legislative power and therefore unconstitutional.

Even in that statement there is no indication that it was claimed that section 315 was unconstitutional because of anything that the President did, either preliminary to issuing his proclamation or because of anything he embodied in his proclamation.

The question as to the constitutionality of section 315, *supra*, I look upon as being *res adjudicata*. It was passed upon in Hampton *v.* United States by this division, a majority sustaining the law, and Judge Brown dissenting,

holding the law unconstitutional. T. D. 41478. In writing the prevailing opinion I said in the concluding paragraph:

> Congress in framing section 315 manifestly contemplated that there might develop greater differences between costs of production of commodities in foreign countries and the United States than existed at the time of the passage of the Tariff Act of 1922, and therefore delegated to the President the power to ascertain through investigation whether and to what extent such changes took place. The President in making such investigation and in determining the difference in such cost of production, as well as fixing a rate of duty which would equal such difference, was carrying out the expressed will of Congress, and was in no sense usurping the constitutional privileges of that body.

From that decision of this court an appeal was taken to the Court of Customs Appeals, where Judge Graham in the last paragraph of an elaborate opinion said:

> It is apparent, from the facts hereinbefore recited and the discussion had, that the single question presented for determination is, whether Congress, in attempting to grant to the President the power to increase the rates of duty specified in the statute by adding thereto the differences in cost of production ascertained by him under section 315 (*a*), acted within constitutional limits, or whether such act was, in that respect, null and void; and our decision is limited to that precise question. (Hampton, Jr., & Co. *v.* United States, 14 Ct. Cust. Appls. 350, 375.)

From such decision of the Court of Customs Appeals the case was carried by *certiorari* to the United States Supreme Court where, upon review the constitutionality of section 315, *supra,* was again upheld. Chief Justice Taft, in concluding the unanimous opinion of the court, said:

> And so here, the fact that Congress declares that one of its motives in fixing the rates of duty is so to fix them that they shall encourage the industries of this country in the competition with producers in other

> countries in the sale of goods in this country, can not invalidate a revenue act so framed. Section 315 *and its provisions* are within the power of Congress. The judgment of the Court of Customs Appeals is affirmed. [Italics mine.] (J. W. Hampton, Jr., & Co. *v.* United States, 276 U. S. 394, 413.)

It is notable that the Chief Justice did not say that section 315 was constitutional in part but instead said that *all its provisions* were within the power of Congress.

In my opinion it is a mighty stretch to hold that the law itself is unconstitutional simply on the assumption that the President erred in exercising the power delegated to him. Such error might invalidate the President's act, but such invalidation could not, in my view, be held to have any bearing on the constitutionality of the statute delegating to him the power to act.

I concur with the view expressed by Judge Sullivan that the testimony offered by the plaintiff is incompetent and immaterial as to any issue here involved in this case, and that therefore the objections thereto are sustained. I also concur in his view that the motion to dismiss the protest be denied with the benefit of an exception to the Government.

All of the questions raised by the protestant have been ruled against it by Judge Sullivan, and with such action I am in complete accord.

C. P. McC., *J.*

DISSENTING OPINION.

BROWN, *Judge:*

This suit against the United States was brought in this court under the legal remedy provided by the customs act by an importer of sodium nitrite. It was tried in Washington, D. C. The plaintiff asks for judgment of refund against the defendant for the amount covering the difference between 3 cents and 4½ cents a pound, said protests constituting a test case.

The plaintiff claims that the Presidential proclamation, T. D. 40204, 45 Treas. Dec. 642, increasing the duty on sodium nitrite from 3 cents a pound to 4½ cents per pound, at which the collector took duty, is *ultra vires,* null and

void, because no proper hearing was had under section 315 to authorize a proclamation; that the resulting higher tax is not legally levied, and consequently his goods were only subject to the statutory rate specifically provided for sodium nitrite, in paragraph 83 of the act of 1922, at 3 cents per pound. There is also a claim in the protest that section 315 is unconstitutional.

The conclusion of the proclamation reads:

> An increase in said duty on sodium nitrite from 3 cents per pound to 4½ cents per pound.

It does nothing except raise the *rate* of taxation upon all sodium nitrite thereafter imported.

The plaintiff's contentions are:

(1) Because he was only served with a deleted petition of the domestic manufacturer asking for the investigation;

(2) Because he was not allowed to fully cross-examine the president of one of the domestic companies who testified at the hearing;

(3) Because he was not allowed to cross-examine the field experts at the hearing, and for other similar reasons, all relating to the conduct of the hearing part of the investigation, that the resulting increased tax was levied and collected without legal authority.

The Government moves to dismiss on the ground that the case does not present a justiciable subject matter, which is practically a demurrer to the protest or complaint, and claims that consequently all evidence concerning the conduct of the hearing is inadmissible.

The hearing provision in section 315, act of 1922, upon which the plaintiff relies reads as follows:

> Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce

> evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The ancient legal rule against Executive legislation or Executive taxation was embodied in the Constitution as Article I, section 1:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

And Article I, section 8:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, etc.

The constitutional rule was that under these provisions the legislative taxing discretion—that is, the power to fix the amount of the future tax—could not be delegated to the Executive. That was illegal because it was discretionary and therefore legislative. Field *v.* Clark, 143 U. S. 649, held that *the fact* that a foreign country levied a discriminatory duty against our exports greater than against the exports of other countries could be proclaimed by the President to bring into effect a retaliatory rate of duty already fixed in amount by Congress. That was sustained because it did not involve discretion and was therefore not legislation by the Executive.

The flexible tariff involves discretion at every stage of the process. It was not sustained as a fact-finding process. It could not be. The subject matter is not an ascertainable fact. It is the expression of an opinion. The Hampton case, 276 U. S. 394, declared a new rule of delegation to the effect that the legislative taxing discretion could, for the first time, now be delegated, provided the policy and plan of the delegation were clearly and intelligently stated under a rule or formula which the delegee should obey.

The action then is legislative action not determining a legal right. Consequently the hearing must be a mere legislative hearing. In the view of the Hampton decision, when the President, acting for Congress, proclaims a new tax, under the formula, Congress, in theory, fixes the tax.

Consequently, when the Tariff Commission, acting for Congress, calls a hearing, that is a congressional hearing.

This court can not dictate the kind of legislative hearing Congress, acting through the Tariff Commission, chooses to hold or declare the resulting tax void by reason of the fact that this legislative hearing is not conducted as a judicial hearing before a court.

The truth, the reality to be faced, and neither evaded nor glossed over, is that the action concerning which a hearing is to be had here is legislative action which does not determine a legal right but perfects a political policy to keep the tariff rates conformed to supposed cost difference. The fact that if under the present legal rule, as expounded in the Hampton case, that may now legally be delegated to, and performed by, executive officers, does not change in the slightest either the nature of the act or the legal incidents of the act. It is doubtful if either legislatures or courts (quite outside of constitutional limitations) can change an inherently political, nonjusticiable, subject matter, which is legislative in kind, into a litigable subject matter, any more than they can change black into white. But there is absolutely no evidence of such intention in this statute or in the opinion of the Supreme Court in the Hampton case.

The Tariff Commission suggests to the President what new customs taxes to proclaim, just as the Finance and Ways and Means Committees suggest to the Congress what new taxes to levy. The legislative analogy is perfect. Neither is a fact-finding body. The difference in production costs is not an ascertainable fact but a matter of personal judgment, often similar to the verdict of a jury or to a mere theoretical allotment of the separate costs of joint products and by-products, which can not actually be separated into figures.

From the nature of the political subject matter here involved, determining the *amount* of a future tax rate; from the fact that the act of fixing a rate for the future is legislative; that it does not enforce a *legal right but carries out a political policy;* from the further fact that the language of the statutory provision itself seems to leave the commission to determine what kind of, and how much of, a hearing it shall have, it follows inevitably that, in pro-

viding for a hearing, Congress meant to establish a legislative rather than a judicial hearing.

At the oral argument at Washington, D. C., the distinguished counsel for the protestant argued as follows:

> I believe that upon the ultimate determination of what the words in section 315 mean depends the continuance of the delegation of the tax-levying power by the Congress into any commission or body; because by its ultimate interpretation of the wording that an interested party has a right to present evidence and to be heard, fixing the rights of interested parties to appear in such a proceeding and particularly to examine what has been collected by the Tariff Commission, in a reasonable way, on the subject, in order that thereupon they may be heard, is going to depend the view of the Congress upon this delegation of power. Upon the question of whether the tariff-making power of the Government is going to be exercised by star chamber proceedings in the presence of the statute, as those words are defined by the Supreme Court of the United States, must depend the view of the Congress of this delegation of power.

This is an intimation that he believes Congress would not have made the delegation in section 315 unless it supposed the courts could review the action of the Tariff Commission in the same sort of way the action of the Interstate Commerce Commission is judicially reviewed.

He argues, therefore, that the hearing provision of section 315 of this act must be construed as if it provided in so many words for a judicial hearing to be governed by the same legal rules as a litigation determining a legal right or obligation. This is exactly as if the domestic manufacturer, petitioning the Tariff Commission for an investigation, was a legal plaintiff; as if the parties interested—that is, affected by the proposed change in the statutory tax, including all the consumers of the article—were, if they cared to be, proper legal parties in the supposed case, plaintiffs and defendants in a legal action; as if the resulting finding of an increased or decreased tax to meet supposed cost difference to carry out the congressional policy was a legal judgment, not, of course, declar-

ing or enforcing a legal right, but legislating the amount of a future tax.

While the mere statement of this proposition and its necessary incidents is its own best answer, it may be well to pursue the inquiry further. Congress is presumed to know the law. Its members are presumed to, and undoubtedly did, know they were dealing with a tax, with the power to make or break, to conserve or destroy, to exclude or confiscate the trade in the articles affected, and not with a legal charge for services, necessarily reasonable, and neither arbitrary nor confiscatory. But they must have known that they did not change the nature of taxation by such delegation and that all taxation, including customs taxation, could be unreasonable, arbitrary, and trade-destroying and therefore was not subject to judicial review as are railroad charges for any of these reasons. Patton *v.* Brady, 184 U. S. at p. 608; Flint *v.* Stone (etc.), 220 U. S. at p. 167; McCray *v.* United States, 195 U. S. at p. 58.

They also must have known that they could not establish a judicial review of the discretionary action within the statute under the formula carrying out the political policy there expressed, which necessarily largely includes discretion over the conduct of the hearing here contested, without turning the reviewing courts, in whole or in part, into tax-levying bodies controlling the ultimate result. The Constitution forbids that, and so far as it remains it must be enforced, whether we happen to think we would be better off without it or not.

No matter who performs it, fixing the amount of the future tax rate is a purely political act, legislative in kind. There is no candid escape from that mental conclusion. Consequently, if the courts can supervise the conduct of it and correct it they perform a political act. By so doing the court legislates, takes part in the political act of fixing the amount of the future tax rate, departs from its high estate and independent position by thus taking part in political action.

It necessarily follows that words in the statute providing for a hearing must be construed in the light of the existing realties. The *public* notice merely apprises them to come to the equivalent of a mere legislative hearing, either to object to or support the proposed change in the statute, and

to prove facts in supplement of this investigation to that end. These words of the statute make this legislative hearing a condition precedent to a proclamation changing the statutory rate of tax. They provide that the Tariff Commission shall give reasonable *public* notice of its hearings and reasonable opportunity to the parties interested, that is, the persons, including *consumers,* affected, who, like the general public, of which they are a part, most emphatically are not parties to a lawsuit who would receive a legal summons. The whole process can take place, and a new tariff rate be fixed, without anyone, domestic producer, importer, or consumer, appearing. There are no necessary parties. There are no legal parties to the proceeding, because no legal right is determined. No one has a legal right to have a new tariff rate imposed. Before the Interstate Commerce Commission, even when it proceeds on its own motion, at least the carrier, the amount of whose charge is in issue, must be summoned to appear and is a necessary party to the proceeding. Otherwise there is no due process of law properly to determine a legal right.

The rule of reasonableness which the Interstate Commerce Commission enforces, namely, the right of the shipper to pay and of the carrier to collect no more than a reasonable toll for services rendered, existed at common law long before Congress was created. It was always judicially enforcible at common law. T. & P. Railway Co. *v.* Abiline Oil Co., 204 U. S. 426. Congress merely redeclared it in the Interstate Commerce Act.

Transfer of the carrier's right to charge a reasonable toll to commission control, subject to judicial review for arbitrary action and confiscatory action, is not, properly speaking, a delegation of congressional legislative power simply because Congress might have arbitrarily fixed nonconfiscatory tolls itself not subject to judicial review for unreasonableness or because arbitrarily imposed. The legal right to a reasonable toll is most emphatically not a formula for delegating legislative power.

The act of delegation does not change the power delegated. It does not change a tax into a toll or give it after delegation the legal incidents of a toll or make it subject to judicial review because arbitrarily or unreasonably imposed.

For a more detailed discussion of the nonlitigable character of the internal process of initiating and levying new taxes by Executive action under section 315 see the writer's dissenting opinion in the original Hampton case, T. D. 41478, 49 Treas. Dec. at pp. 626, 630, and 633, and opinion on the motion to dismiss at the Philadedphia docket in American Stores Co. *v.* United States, T. D. 44392, decided November 17, 1930. See also the discussion of the same subject in Judge Young's opinion in Fox River Butter Co. *v.* United States, T. D. 44667, decided February 24, 1931.

Up to this point we have proceeded on the assumption that section 315 is constitutional. Upon that assumption the above considerations would result in judgment for the defendant, either granting the Government's motion to dismiss or overruling the protest. But similar considerations also point unmistakably to the unconstitutionality of section 315 for the following reasons not advanced in the Hampton case.

No investigation starts except in the discretion of the Tariff Commission or the President. In United States Ex rel. Norwegian Nitrogen Products Co. *v.* United States Tariff Commission, 274 U. S. 106, Mr. Justice Stone said, p. 110:

> Under sec. 315 (*c*) and (*e*) of the Tariff Act of 1922, the President is given authority to require an investigation by the Commission and it is its duty to make one when so required. There is no other provision of the act placing any duty on the Commission to make such an investigation. When not so requested by the President, action by the Commission is discretionary. Under its rules it is optional with it whether it will employ its resources for investigations sought by an interested party.

It is equally certain that after the investigation is over the President may decline to follow the recommendation of the Tariff Commission and make no change in the tax rate. This is not denied by anyone. It actually happened in the sugar, linseed oil, and other investigations.

That means that however intelligent the purpose and plan of adjusting rates to cost difference may be, executives, and not the Congress, decide if and when it shall

operate, if and when it shall ever be carried into effect. It is not automatic and self-acting, but the Tariff Commission and President can legally refuse to put it into operation in whole or in part. This Executive discretion to start it or to refuse to end it is wholly legislative in character. Executive legislation, which the Constitution forbids, is the only name which can be applied to it. Thus the expediency and just operation of section 315 is unmistakably left to Executive will and discretion. This plain exercise of the legislative taxing discretion by Executive authority not only precludes any possibility of any judicial review of the internal process, but it just as plainly makes section 315 unconstitutional.

To render judgment for defendant would be to enforce a law believed by the writer to be unconstitutional. In his opinion a judgment should therefore be rendered for the plaintiff for the amount of taxes collected in excess of the statutory rate in paragraph 83 of the act of 1922.

This question of Executive discretion to decide if and when the formula shall operate was not raised, discussed, or expressly decided in Hampton *v.* United States, 276 U. S. 394. An unconstitutional law can not be enforced by the courts simply because plaintiff's counsel, after his client claims it is unconstitutional in the protest, mistakenly asserts that he believes it to be constitutional, pressing his claim for relief from the tax involved upon other grounds. The question of constitutionality is jurisdictional and raises itself whenever the unconstitutional law comes to be enforced by judicial decree. This question can not be overlooked in any case where the protest makes the express claim of unconstitutionality.

My associates seem entirely conscious of this, for, while they vigorously and categorically deny (on account of the way plaintiff's counsel presented his case) that the question of constitutionality is before us for decision, they, nevertheless, argue that section 315 is constitutional as necessary to their conclusion overruling the protest. For if section 315 is unconstitutional the protest can not be overruled.

In support of their holding they cite freely from the Hampton case, above and below, and broadly construe it as as deciding a question it does not discuss, namely,

whether Executive decision to put into effect the rate changing machinery or to refuse to do so vitiates the section.

This Executive discretion to refuse to start the process or refuse to carry out the purpose and plan of section 315 has another plain effect. It results in a new tax being initiated at the will of those outside of Congress in violation of the express terms of Article I, section 7, which reads:

> All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

In my opinion that does not contemplate or permit an Executive decision as to whether a congressional rate of taxation shall be investigated for Executive change or permitted to remain in force. In my view, we should not look upon the commands in the Constitution against Executive legislation and against Executive initiation of a tax as something to be gotten around if possible but as something to support and defend whether we like them or not.

The above conclusion is not rested upon the expression in subsection (*c*) authorizing the use of "any *other* advantages and disadvantages in competition" mentioned in the proclamation as here used.

That indefinite expression necessarily includes (as the act expressly states) many things "*other*" than costs, which are entirely different from costs.

No one has yet explained how "cost differences" can be found from them. The Supreme Court's opinion in the Hampton case does not discuss the legal effect of the presence of these words in the statute, although the report of the case shows that the section was claimed to be unconstitutional because of them. Are they to be considered as not involved in that case? Again, are they to be treated as meaningless because unworkable as part of a cost-difference formula?

Their use (as well as the stated discretion to use them or not) necessarily involves a purely legislative discretion, for the expression includes everything relating to business success in competing with foreign rivals.

GEO. STEWART BROWN, *J.*

Judgment.

U. S. CUSTOMS COURT, FIRST DIVISION.

Protests 92852-G, etc.

NORWEGIAN NITROGEN PRODUCTS CO.

vs.

THE UNITED STATES.

This case having duly come on for trial before the First Division of the United States Customs Court, and the same having been heard and submitted for decision, and the Court, after due deliberation, having made and filed a decision herein, in favor of the defendant, and against the plaintiff, directing that judgment be entered herein in accordance therewith; now in conformity with said decision,

It is hereby ordered, adjudged and decreed that the protests in this case be, and the same are hereby, overruled.

Witness Hon. C. P. McClelland, Hon. J. B. Sullivan, Judges of the United States Customs Court, and the seal of said Court, at the City of New York, this 21st day of April, A. D. 1931.

J. W. DALE,
Clerk U. S. Customs Court.

Exhibit 1.

The White House, Washington.

October 6, 1922.

MY DEAR COLONEL MARVIN:

I am enclosing you herewith the Executive Order covering the reference of all applications for tariff revision to the Tariff Commission under such rules and regulations as the Commission may prescribe. I have not included the second paragraph of your suggested order because I assume that the Commission has the power to undertake such investigations as may be deemed desirable, and I can well believe there will be ample work to do without in-

stituting inquiries outside the many applications which are likely to be filed.

Very truly yours,

WARREN G. HARDING.

Col. Thomas O. Marvin, Chairman United States Tariff Commission, Washington, D. C.

Indorsed: U. S. Customs Court. Exhibit 1. Prot. No. 92852-G, &c. Date: 11/24, 1930. S. C. H., Reporter.

EXECUTIVE ORDER.

It is ordered, that all requests, applications, or petitions for action or relief under the provisions of Sections 315, 316, and 317, of Title III of the Tariff Act approved September 21, 1922, shall be filed with or referred to the United States Tariff Commission for consideration and for such investigation as shall be in accordance with law and the public interest, under rules and regulations to be prescribed by such Commission.

WARREN G. HARDING.

The White House, October 7, 1922.

Enclosure with White House letter of Oct. 6, 1922.

Exhibit 2.

Indorsed: U. S. Customs Court. Exhibit 2. Prot. No. 92852-G. Date: 11/24, 1930. S. C. H., Reporter.

United States Tariff Commission, Washington, D. C.

Executive Order and Rules of Procedure Before the United States Tariff Commission under Sections 315, 316, *and* 317 *of Title III of the Tariff Act Approved September* 21, 1922.

Executive Order

It is ordered, that all requests, applications, or petitions for action or relief under the provisions of Sections 315, 316, and 317 of Title III of the Tariff Act approved September

21, 1922, shall be filed with or referred to the United States Tariff Commission for consideration and for such investigation as shall be in accordance with law and the public interest, under rules and regulations to be prescribed by such Commission.

WARREN G. HARDING.

The White House, October 7, 1922.

Application for Investigation.

Application for an investigation under Section 315, 316, or 317 of Title III of the Tariff Act approved September 21, 1922, may be made by any person, partnership, corporation or association.

An application is not required to be in any special form but it must be in writing and signed by or on behalf of the applicant and in the case of an application under Section 316 it must be under oath. Every application must state the name, legal residence, business address, occupation and business connection of the applicant, and contain a short and simple statement of the relief sought and the grounds therefor.

No investigation shall be ordered by the Commission unless such application or preliminary investigation discloses to the satisfaction of the Commission that there are good and sufficient reasons therefor under the law.

If the information contained in the application is deemed by the Commission to be insufficient, the Commission may permit the applicant to amend the same or to submit evidence orally or in writing.

Preliminary Finding under Section 316.

In the case of applications for an investigation under Section 316 the Commission shall consider the application and the evidence submitted therewith with a view to determining whether the entry of any goods shall be forbidden pending further investigation in accordance with subdivision (*f*) of Section 316.

Investigations under Sections 315 and 316.

An investigation may be ordered by the Commission under Section 315 or 316 either upon the initiative of the Commission or upon application.

The Commission will not be confined to the issues presented in an application but may broaden, limit or modify the issues to be determined.

The Commission shall issue a notice of the nature and scope of any investigation which it may institute under Section 315 or 316 and such notice shall be published in "Treasury Decisions," and in the weekly edition of "Commerce Reports," by one insertion in each thereof.

Appearances.

Any person, partnership, corporation or association, showing to the satisfaction of the Commission an interest in the subject matter of an investigation ordered by the Commission, may enter appearance in such investigation in person or by a representative.

Hearings under Sections 315 and 316.

Parties who have entered appearances in investigations under Sections 315 and 316 shall be notified of the time and place of public hearings by registering and mailing a copy of the notice thereof addressed to each of such parties at the place of business thereof, and at such time and place, except on final hearing, such parties shall be afforded opportunity to offer such relevant testimony, both oral and written, as the Commission may deem necessary for a full presentation of the facts involved in such investigation.

Hearings shall be public unless the Commission orders otherwise.

Evidence, written or oral, submitted in hearings shall upon order of the Commission be subject to verification from the books, papers and records of parties in interest. Such further investigation may be had as the Commission shall order.

Invesigations and Hearings under Section 317.

If in any investigation under Section 317 it becomes necessary in the judgment of the Commission to order a hearing a notice shall be given and hearings hall be had, as provided with respect to hearings under Section- 315 and 316.

Witnesses and Subpœnas.

Witnesses unless otherwise ordered by the Commission shall be examined orally.

The attendance of witnesses and the production of documentary evidence may be required from any place in the United States at any designated place of hearing.

Any member of the Commission may sign subpœnas and members and agents of the Commission, when authorized by the Commission, may administer oaths and affirmations, examine witnesses, take testimony, and receive evidence.

The Commission may order testimony to be taken by deposition in any proceeding or investigation at any stage of any such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition or under his direction and shall then be subscribed by the deponent. Any person, firm, copartnership, corporation or association may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission.

Witness Fees and Mileage.

Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same, except employees of the Commission, shall severally be entitled to the same fees and mileage as are paid for like service in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witness appears.

The Commissioner or Investigator in Charge of Investigations.

The Commissioner or investigator in charge of any investigation shall review all the evidence, oral and written, and all other information gathered in such investigation by the Commission, and shall summarize the same and prepare for the Commission in writing a report.

Parties who have entered appearances shall, prior to the filing of briefs, have opportunity to examine the report of the commissioner or investigator in charge of the investigation and also the record except such portions as relate to trade secrets and processes.

Briefs.

Briefs may be filed at the conclusion of the testimony in each investigation. The commissioner or investigator in charge of the investigation shall fix a time within which briefs shall be filed and notice thereof shall be given by registered mail to all parties of record.

Briefs shall be printed in such form and manner as the Commission shall direct.

Final Hearings and Findings.

Final hearings shall be before the Commission. Parties who have previously entered appearances may file briefs and upon permission being granted by the Commission present oral arguments. The findings of the Commission and of the members thereof shall be in writing and shall be transmitted, together with the record, certified by the Secretary under the seal of the Commission, to the President for his action under the law.

Appeals under Section 316.

Appeals on matters of law under Section 316 shall be governed by the rules relating to appeals to be taken to the United States Court of Customs Appeals from decisions of the United States Board of General Appraisers.

Exhibit 3.

File Copy.

Public Notice of Investigations by the United States Tariff Commission under the Provisions of Section 315 *of Title III of the Tariff Act of* 1922.

Investigation No. 7 by the United States Tariff Commission for the Purposes of Section 315 of the Tariff Act of 1922.

Sodium Nitrite.

The United States Tariff Commission on this 27th day of March, 1923, for the purpose of assisting the President

in the exercise of the powers vested in him by Section 315 of Title III of the Tariff Act of 1922 and under the powers granted by law and pursuant to the rules and regulations of the Commission, hereby orders an investigation of the differences in costs of production of, and of all other facts and conditions enumerated in said Section with respect to, the articles described in paragraph 83 of Title I of said Tariff Act, namely, Sodium nitrite, being wholly or in part the growth or product of the United States, and of and with respect to like or similar articles wholly or in part the growth or product of competing foreign countries.

Ordered further, that all parties interested shall be given an opportunity to be present, to produce evidence, and to be heard at a public hearing in said investigation to be held at the office of the Commission in Washington, D. C., or at such other place or places as the Commission may designate, on a date hereafter to be fixed, of which said public hearing at least thirty days' public notice shall be given by publication once each week for two successive weeks in "Treasury Decisions" published by the Department of the Treasury, and in "Commerce Reports" pubilshed by the Department of Commerce, copies of which said publications are obtainable from the Superintendent of Documents of the Government Printing Office in Washington, D. C.

And ordered further, that public notice of said investigation shall be given by posting a copy of this order thirty days at the principal office of the Commission in the City of Washington, D. C., and at the office of the Commission at the port of New York, and by publishing a copy of this order once a week for two successive weeks in said "Treasury Decisions" and in said "Commerce Reports".

I certify that the foregoing is a true copy of an Order of the United States Tariff Commission passed on the 27th day of March, 1923.

JOHN F. BETHUNE,
Secretary.

Indorsed: U. S. Customs Court. Exhibit 3. Prot. No. 92852-G, &c. Date: 11/24, 1930. S. C. H., Reporter.

Exhibit 4.

Filed Copy.

Public Notice of Hearing by the United States Tariff Commission under the Provisions of Section 315 *of Title III of the Tariff Act of* 1922.

Investigation No. 7 by the United States Tariff Commission for the Purposes of Section 315 of the Tariff Act of 1922.

Sodium Nitrite.

Notice is hereby given pursuant to Section 315 of the Tariff Act of 1922, that a public hearing in the foregoing investigation will be held at the office of the United States Tariff Commission in Washington, D. C., at 10:00 o'clock A. M., on the 10th day of September, 1923, at which all parties interested will be given an opportunity to be present, to produce evidence, and to be heard with regard to the differences in cost of production and of all other facts and conditions enumerated in Section 315 of the Tariff Act of 1922 with respect to the following article described in paragraph 83 of Title I of said Tariff Act, namely:

> Sodium nitrite, being wholly or in part the growth or product of the United States, and of and with respect to like or similar articles wholly or in part the growth or product of competing foreign countries.

This notice shall be published by posting a copy thereof for thirty days prior to said 10th day of September, 1923, at the principal office of the Commission in the City of Washington, D. C., and at the office of the Commission at the port of New York, and by publishing a copy thereof prior to said date once each week for two successive weeks in "Treasury Decisions" and in "Commerce Reports".

By the United States Tariff Commission this 20th day of July, 1923.

JOHN F. BETHUNE,
Secretary.

Indorsed: U. S. Customs Court. Exhibit 4. Prot. No. 92852-G, &c. Date: 11/24, 1930. S. C. H., Reporter.

Exhibit 5.

Indorsed: U. S Customs Court Exhibit 5 Prot. No. 92852-G, &c. Date: Nov. 24, 1930. S. C. H., Reporter.

BEFORE THE U. S. TARIFF COMMISSION.

Investigation No. 7, Section 315, Tariff Act of 1922.

In the Matter of the Investigation of the Costs of Production of Sodium Nitrite.

WASHINGTON, D. C., September 26, 1923.

The above-entitled matter came on for further hearing at the office of the United States Tariff Commission, 7th and E Streets N. W., at 10 o'clock a. m.

Present:

Commissioners MARVIN (Chairman), CULBERTSON (Vice-Chairman), BURGESS, GLASSIE, and COSTIGAN.

Present also: Secretary BETHUNE.

Appearances:

Mr. C. F. Graff, 907 Securities Building, Seattle, Washington, appearing in behalf of American Nitrogen Products Company.

Mr. Marion De Vries (De Vries & Dougherty), 406 Southern Building, Washington, D. C., appearing in behalf of Norwegian Nitrogen Products Company, 17 State Street, New York.

Proceedings.

The Chairman: The hearing in connection with the investigation of sodium nitrite is now open. Are there any parties present who desire to be heard?

Mr. De Vries: Mr. Chairman, since the last hearing we have received from the Commission, under date of September 15, 1923, a summary of information in the matter of sodium nitrite, the subject of a public hearing September 10, 1923. In the time allowed, we have not had opportunity to thoroughly examine the same, in the presence of

our clients, who are posted upon the facts, nor to get data thereupon from the points wherefrom we have to get it, to wit, Seattle and Norway. We cabled Norway as follows:

"Tariff Commission published result investigators' work abroad estimates your cost production at six kroners per dollar at 2.183 per hundred pounds at four kroners per dollar $3.27½ per hundred pounds deducting from average spring 1923 invoice value of 4.84 per Lb. CIF New York Pasking 0.204 inland freight 0.026 ocean freight and insurance 0.273 hundred pounds total charges 0.503 gives 4.34 per pound at factory this leaves about 100% profit please telegraph your instructions urgent for hearing 26th day of September."

To which we received the following answer:

"Your telegram 24/9 stop Tariff Commission estimate cost production completely erroneous cost production by far surpasses their estimate stop On principle we always refuse publish cost price consequently did not furnish investigators any information enabling them calculate cost price stop We thus strongly contest investigators' competence stop Your letter 12/9 with minute hearings received today stop No time study same but perusal permits state several Graffs statements regarding our company and process incorrect."

I want to submit to the Commission that the statute in this case permits interested parties who appear a reasonable opportunity to be present, to produce evidence, and to be heard. We were not given any data collected by the Commission until September 15, 1923, and the few days since, up to the present time, are not sufficient to thoroughly examine and digest the same, and obtain evidence in disproof of that, which we desire to submit.

Commissioner Culbertson: May I ask, Judge De Vries, at the last hearing of this case, were there not present with you in the hearing room three of your clients?

Mr. De Vries: There were——

Commissioner Culbertson (interposing): Would you mind——

Mr. De Vries (continuing): One of my clients, Mr. Culbertson.

Commissioner Culbertson: There were three, however, who were informed to some extent concerning the subject of sodium nitrite.

Mr. De Vries: I can speak for but one. I can speak for my own client, Mr. Lodrup. Candidly, Mr. Culbertson, I do not know; I do not recall at the moment of any other parties who were interested. The Norwegian Consul was here. I do not believe a consul or minister is interested in this proceeding.

Commissioner Culbertson: The Commission had no opportunity at that time to get information from your client.

Mr. De Vries: No, sir. As I read the statute, our client, being an interested party, has a right to be present, to produce evidence, if he wants, or not, and to be heard, without submitting himself to the jurisdiction of this Commission for examination, and without submitting to this Commission, in consideration of his statutory rights, any evidence of others or of himself. We understand that the statute accords our client certain rights, to be present and to be heard, and to produce evidence without any consideration therefor, and the statute does not exact, as I have stated before, as a condition precedent, that before we can enjoy these statutory rights we must submit any evidence as to any of our processes, any of our costs, or any other data.

Commissioner Culbertson: My only point is that he was present at the last hearing.

Mr. De Vries: He was.

Commissioner Culbertson: And did not tender any information which he had.

Mr. De Vries: He did not tender any information, and I do not assume that he had any information. I do not think the Commission can rightly assume, for the purposes of this proceeding, that he had any information.

The Chairman: Mr. De Vries, is the assumption correct, that your client knows from personal knowledge the cost of production of sodium nitrite in Norway?

Mr. De Vries: I do not think that assumption is correct. As a matter of fact I know it is not correct, and that answer is fully substantiated by the situation of the plants that are producing nitrite in Norway and the United States.

The Chairman: You made the statement that the time permitted has not given you an opportunity to prepare your case and present evidence in refutation of testimony presented, and to obtain correct information from Norway as to the actual costs of production in Norway.

Mr. De Vries: I did not say——

The Chairman (interposing): Are you asking for an extension of time to enable you to obtain this information?

Mr. De Vries: Yes, sir; I ask for 30 days, deeming that a reasonable extension.

The Chairman: If an extension of time is granted, does the Commission understand that we will receive from you definite figures of the cost of production of sodium nitrite in Norway?

Mr. De Vries: Mr. Chairman, I am not bartering for what I am asking. I am not offering any consideration.

The Chairman: The Commission must know, it seems to me——

Mr. De Vries: I am asking, Mr. Chairman, let it be distinctly understood, for our statutory rights before this body, without any consideration therefor, except the rights the law affords us, of a fair hearing and a reasonable time to present our testimony, if we may see fit to testify.

Commissioner Culbertson: The question is whether the time is reasonable.

Mr. De Vries: That is the whole question, Mr. Commissioner.

Commissioner Culbertson: That cable which you have just read from Norway interests declines to give the information which the Commission would like to have from Norway. Therefore, that cannot be gotten in any length of time. It then comes down to the question of whether or not you have had a reasonable time to examine the information which you now have in your possession.

Mr. De Vries: I do not think that quite accurately measures the situation, Mr. Commission. The Commission is asking us to produce the cost of production in our own factory. That is not all the evidence of the cost of production of sodium nitrite in Norway. I may go further and say that the cost of production in the factory of the Norwegian Products Company might be found by this Commission not to be the fair cost of production, or the cost of production in Norway.

Now, the Commission's own report shows that to be true, and proceeds upon the correct principles, to my mind, under the statute, that they gather whatever evidences of cost of production are available in Norway. Now, they have produced certain costs of production in Norway. We say that those proofs that are produced here are not accurate and are not the true costs of production, and we want the right to produce evidence to disprove the figures that are submitted by the Commission. We may disprove it by evidence *aliunde*. We may disprove it by statements from our own factories. That is for us to determine; but the cost of production in these cases, as I read the statute, is not the cost of production of any particular factory, at home or abroad.

If, as was suggested upon this particular statute before the Ways and Means Committee, when a similar statute was offered, we undertook to grow pineapples in Maine, and were unsuccesful, because we could not come in and get an increased tariff rate to grow pineapples in Maine. So the cost of production in Mr. Graff's factory in Seattle is not necessarily the finding upon which this Commission is going to predicate these duties. The question is, what is the cost of production in the United States, and not what is the cost of production in Mr. Graff's factory in Seattle. Upon these subjects we are ready to offer proof, and to do so it is not necessary for us to exhibit to this Commission the costs of production in our own factory.

Mr. Graff: Mr. Chairman, am I to understand that the opposition is now asking for additional time in which to produce proof as to foreign costs of nitrite?

The Chairman: That is the nature of the request.

Mr. Graff: And to submit additional evidence along that line. If so, I object, on the ground that the hearing was absolutely closed on September 10 last. Furthermore, that they had ample time previously, through proper public notice, in which to produce their proof.

The Government expert visited Norway and Germany and other countries for the purpose of ascertaining costs, and had obtained information in so far as they could get it. The Norwegian producers refused to disclose their costs, and if they now come in and ask, through cablegrams, or otherwise, for additional time, after the matter

has been discussed in public hearing, I object, of course, to that grant of time.

Mr. De Vries: Of course, Mr. Chairman, in reply to that, we are relying strictly upon the statute. The statute says that in these investigations, the interested parties shall have the right to be present, to produce evidence, and to be heard. They shall have reasonable opportunity to be present, and a reasonably opportunity to be heard. That is the language of the statute, to be present, to produce evidence, and to be heard upon the subject of these investigations.

Now, the subject of this investigation is produced to the interested parties under date of September 15, 1923, in which is set forth in detail a tentative cost of production in Norway. We therefore submit that under the statute we have a right to a reasonable time to examine that statement, and if we see fit, to produce evidence in disputation thereof, or to be heard thereupon.

Commissioner Glassie: Judge De Vries, didn't you have a reasonable time, when you had reasonable ground to anticipate that the results of the inquiry in Norway would be made known, and if they were not to your liking, you could rebut them when they were made known?

Mr. De Vries: Quite true, Mr. Glassie. I am glad you asked the question. You served on our clients a copy of the petition in this case. It set forth that the plant in Seattle represented an investment of $1,229,000, and asked interest upon it. We spent days and nights, and money, in gathering evidence in disputation thereof, and when we appeared in this tribunal ready to disprove those allegation, we were told that in the secret files of this Commission were other data, and that they were out of the way; so that I say to you——

Commissioner Glassie (interposing): If you prepared yourself to meet a merely collateral issue, which obviously cannot determine the matter in controversy, and failed to prepare yourself to meet the very point in issue, why do you lay the responsibility on the Commission?

Mr. De Vries: I am not laying the responsibility on the Commission. I am laying it on the situation. In answer to that, the only statement of cost was in that petition, that we knew of, of investment and cost that we knew of,

and the petition prayed that a rate of duty be fixed that would realize interest upon that statement of cost.

The Chairman: Judge De Vries, according to the statute——

Mr. De Vries (interposing): We cannot tell what we have to meet until it is before us. We did not know what we had to meet in this case until it was before us in this statement.

Commissioner Glassie: You have the first knowledge of your own costs, and that being the issue, ample time being given to you to meet that issue, it seems to me that if you were not satisfied, that was the time to give such information as you possessed.

Mr. De Vries: Our own costs are but half of the case.

Commissioner Glassie: I am referring now entirely to your own costs.

Mr. De Vries: Our own costs are but half the case.

Commissioner Glassie: The people in Norway refused to give direct access, as I understand it, to their books. They knew that the issue was cost, and their cost, the difference between their cost and the American cost, involving their cost. They knew that a hearing was to be had, in which that would be the principal and main issue.

Mr. De Vries: Yes, sir.

Commissioner Glassie: Having declined to give that information, and knowing that the hearing was relating to that issue, it would seem reasonable that they should have come to that hearing prepared to disclose, if they ever intended to disclose——

Mr. De Vries: I do not understand that we have to come forward with any evidence whatsoever, as a condition precedent to enjoying the rights the statute gives us, to be present in these cases, and to hear the evidence that is produced against us, to produce evidence against that, and to be heard upon that evidence. That is a part of the petitioner's case, to prove his cost of production and that abroad, or for this Commission to investigate and so find, and we have a right to be heard upon that proof, and those findings, under the statute.

The Chairman: Judge De Vries, according to the statute, the issue in this case is the difference in the cost of production. As counsel for one of the parties, you knew

months ago that the issue would depend upon, or turn upon the difference in cost of production. The Commission will rule that in its opinion you have had ample time to prepare a statement of costs of production for your clients and meet the issue at the hearing before the Commission, and will decline the request for a further extension of time for hearings in this case.

Mr. De Vries: To that ruling we except.

The Chairman: Very well.

Mr. Graff: Mr. Chairman, I take it for granted that no additional evidence, under that ruling would be permissible in so far as costs on the part of the opposition are concerned. In other words, that the evidence and testimony are supposed to have been closed as of the last hearing.

The Chairman: The notice was served upon the parties in interest that this adjourned hearing on sodium nitrite, set for September 26, would be postponed or adjourned until October 4th. Am I correct?

Mr. De Vries: Yes. We received a notice of that kind.

The Chairman: That is the status of this case at present.

(At this point followed a conferenec at the Bench between the Commissioners, at the conclusion of which the following occurred:)

Mr. Graff: Mr. Chairman, if the purpose here is merely to extend the time up to October 4th, for final argument, of course, that is entirely satisfactory to us; but if the purpose is to permit the introduction of additional evidence, we again, of course, would object. We think that the opposing counsel's attitude is absolutely absurd. He makes the point that the Government submitted certain information. We neither had access to that information before it was produced. We were exactly on the same basis. They had their opportunity to produce costs, and they refused. We had our opportunity, and willingly granted every access to the Government, to make the investigation. We then testified, produced certain facts, and they cross-examined us.

Now, after this has all been done, as I understand it, they come in and ask for permission to produce evidence and rebut our cost evidence, as well as the Government's. I think it is absolutely absurd and should not be granted.

The Chairman: A statement of facts in the possession of the Commission was handed to counsl on each side, and the Commission is of the opinion that a reasonable opportunity to meet the statements submitted as to the facts in the possession of the Commission is proper and right. On October 4 the Commission will be ready to hear further arguments in this case, and such evidence as counsel have to offer in connection with the statement of facts in the possession of the Commission, which was submitted to counsel.

Mr. De Vries: Now, Mr. Chairman, in reference to October 4th, without waiving our request to grant further time, or to grant 30 days, October 4, I believe, falls on Thursday next.

The Chairman: Thursday is correct, yes, sir.

Mr. De Vries: I wish the Commission could give us a litle more time. I want to make what showing can be made in the limited time, without waiving our rights, but I wish the Commission would extend that to the following Monday, for the reason that, as a personal matter, I am compelled to go into a hospital in New York on Monday, and will be there until Thursday, and it will be a physical impossibility to meet this situation on the 4th.

Commissioner Glassie: We will be very glad to extend it.

The Chairman: We will be very glad to accommodate you. There is nothing set on that date.

Mr. De Vries: Mr. Chairman, I would like the indulgence of the Commission to make a few formal requests.

As you all know, these proecedings do not conccern this case alone. I want to make formal requests, as an interested party appearing in this case, that we have reasonable opportunity to inspect and to be heard upon all evidence which has been offered in this case, not deemed by the Commission trade secrets, or not, in fact, trade secrets or processes. That is request No. 1.

We want to make the further request that the Commission afford us the same rights to inspect, and to offer evidence in disputation thereof, if we see fit, and to be fully heard upon, all the evidence in the possession of the Commission, as to the cost of power in the United States in the production of nitrite.

Third, the same request as to the number of laborers

employed, and the wages paid in the American Nitrogen Products testimony submitted before this Commission.

Fourth, the same request as to all capital invested in the American Nitrogen Products Company plant in the State of Washington.

Fifth, referring to the summary of information in the matter of sodium nitrite, the subject of a public hearing September 10, 1923, that we have opportunity to cross-examine the experts of this Commisison who gathered this testimony, as to the testimony which they have submitted to the Commission, and that we have the right to offer such testimony as we may see fit in opposition thereto, and that we have the right and reasonable opportunity, to be heard thereupon.

The Chairman: The request will be taken under consideration.

Commissioner Glassie: How shall we announce our decision on that? It must be done before October 4.

The Chairman: It must be done before October 4.

Commissioner Glassie: You will be notified in writing prior to October 4.

The Chairman: Counsel will be notified in writing by the 4th.

Mr. De Vries: I thank the Commission for its indulgence.

The Chairman: Is there anyone else who desires to be heard?

Mr. Graff: It may not be possible for me to remain as long as that, and, of course, if I am not here, I shall not be able to testify.

The Chairman: The Commission hopes, Mr. Graff, that you may find it possible to be present. If it is not possible for you to arrange to be present, such briefs as you care to leave with the Commission will have careful consideration and the case will have consideration by the Commission in view of all the facts presented, your oral testimony, the briefs that you have filed, and the testimony presented by the opponent's petition.

Commissioner Costigan: May I ask, Mr. Graff, whether you have been staying here at some personal inconvenience to yourself?

Mr. Graff: I should say I have; and I, of course, am not objecting to this extension, because, as I understand it, it is a personal matter with Judge De Vries, and I cannot reasonably object. Certainly it is very inconvenient for me. I was going to say, when he asked for the extension until October 8th, on account of having to go into the hospital on the preceding Monday, that the date be advanced to the preceding Saturday, so the hearing could be held before; in other words, a day or two earlier, rather than three or four days later.

Mr. De Vries: That would be all right, understanding, however, that this consent of ours to any hearing short of 30 days is excepted to. Let it be the following Saturday.

Mr. Graff: If that could be arranged, I would certainly appreciate it.

Commissioner Costigan: What date have you in mind, Judge De Vries, this coming Saturday, or Saturday week?

Mr. De Vries: Saturday week. That is the 6th, isn't it?

Commissioner Costigan: Yes.

Mr. Graff: Understand, gentlemen, that I should like to be——

The Chairman (interposing): I understand it was a date prior to October 4.

Mr. Graff: I should like the date advanced as far as possible. I am simply staying here to wait for this hearing.

The Chairman: There would be no opportunity, Judge, to advance the date prior to October 4.

Mr. De Vries: Certainly not; not so far as I am concerned.

Mr. Graff: I asked that it might be.

Commissioner Glassie: That was Mr. Graff's suggestion, and we understood you to agree to it.

Mr. De Vries: No.

The Chairman: We understood you to agree to that.

Mr. De Vries: No. I understood his request to be to advance it from the 8th to the Saturday preceding, which would be the 6th.

Commissioner Glassie: Do you feel that you can surely attend on the 6th?

Mr. De Vries: I will be here. Understand, we have to print briefs. We have to write briefs and get the documents together.

Mr. Graff: Mr. Chairman, may I ask if it could be advanced to any day during that week, that is, some time between October 1st and October 6th?

The Chairman: Judge, October 4 is too early a date, we understand?

Mr. De Vries: Yes.

The Chairman: And October 6th would be agreeable to you, Saturday, October 6th?

Mr. De Vries: If some date is to be set so soon as that, yes. It will take two or three days to print the briefs.

Commissioner Glassie: Mr. Graff, it does not make much difference between the 6th and the 8th?

Mr. Graff: Every day counts, of course.

The Chairman: If it is agreeable to both parties, the date for the adjourned hearing on sodium nitrite will be fixed for Saturday, October 6th.

Commissioner Glassie: And the same statements made with regard to the 8th will apply to the 6th.

Mr. De Vries: With the understanding, of course, Mr. Chairman, that I except to any date earlier than 30 days from date, as not being a reasonable opportunity. I will be here on the 6th, to comply, in so far as I can, with the Commission's order.

Commissioner Costigan: I do not understand, Judge De Vries, that you have excepted to the 6th of October, but that you except generally to the refusal of the Commission to extend the time for 30 days, for any further hearing.

Mr. De Vries: Yes; and any longer time than the 6th.

The Chairman: Are there any other parties who desire to be heard? If not, the hearing will be adjourned to Saturday, October 6th.

Commissioner Glassie: Will you be here on the 6th, Mr. Graff, do you think?

Mr. Graff: I will try to be here.

Commissioner Glassie: We have changed it from the 8th to the 6th, to accommodate you. It is impossible to advance it any further.

Mr. Graff: I shall certainly try to be here.

The Chairman: If there are no other parties to be heard, the hearing stands adjourned until Saturday morning, October 6, 1923, at 10 o'clock a. m.

(Whereupon, at 10:40 o'clock a. m., the hearing in the above entitled matter was adjourned until Saturday, October 6, 1923, at 10 o'clock a. m.)

Exhibit 6.

Indorsed: U. S. Customs Court. Exhibit 6. Prot. No. 92852-G, &c. Date: 11/24, 1930. S. C. H., Reporter.

BEFORE THE U. S. TARIFF COMMISSION.

Investigation No. 7, Section 215, Tariff Act of 1922.

In the Matter of the Investigation of the Costs of Production of Sodium Nitrite.

WASHINGTON, D. C., September 10, 1923.

The above-entitled matter came on for hearing at the office of the United States Tariff Commission, 7th and E Streets Northwest, at 10 o'clock a. m.

Present:

Commissioners MARVIN (Chairman), CULBERTSON (Vice-Chairman), BURGESS and GLASSIE.
Present also: Secretary BETHUNE.

Appearances:

Mr. C. F. Graff, 907 Securities Building, Seattle, Washington, appearing in behalf of American Nitrogen Products Company.

Mr. Marion De Vries (De Vries & Dougherty), 406 Southern Building, Washington, D. C., appearing in behalf of Norwegian Nitrogen Products Company, 17 State Street, New York.

Mr. A. Lundh, Commercial Counselor, Norwegian Legation, Washington, D. C.

Proceedings.

The Chairman: The hearing in connection with the investigation of the cost of production of sodium nitrate is

now open. Opportunity will be afforded for witnesses to present testimony, the witnesses for the petitioner being heard first. All witnesses will be sworn. The Secretary will read the order of investigation.

The Secretary: On the 27th day of March, 1923, the United States Tariff Commission adopted the following order:

"The United States Tariff Commission on this 27th day of March, 1923, for the purpose of assisting the President in the exercise of the powers vested in him by Section 315 of Title III of the Tariff Act of 1922 and under the powers granted by law and pursuant to the rules and regulations of the Commission, hereby orders an investigation of the differences in costs of production of, and of all other facts and conditions enumerated in said Section with respect to, the articles described in paragraph 83 of Title I of said Tariff Act, namely: Sodium Nitrite, being wholly or in part the growth or product of the United States, and of and with respect to like or similar articles wholly or in part the growth or product of competing foreign countries.

"Ordered further, that all parties interested shall be given an opportunity to be present, to produce evidence, and to be heard at a public hearing in said investigation to be held at the office of the Commission in Washington, D. C., or at such other place or places as the Commission may designate, on a date hereafter to be fixed, of which said public hearing at least thirty days' public notice shall be given by publication once each week for two successive weeks in 'Treasury Decisions' published by the Department of the Treasury, and in 'Commerce Reports' published by the Department of Commerce, copies of which said publications are obtainable from the Superintendent of Documents of the Government Printing Office in Washington, D. C.

"And ordered further, that public notice of said investigation shall be given by posting a copy of this order for thirty days at the principal office of the Commission in the city of Washington, D. C., and at the office of the Commission at the port of New York, and by publishing a copy of this order once a week for two successive weeks in said 'Treasury Decisions' and in said 'Commerce Reports'."

On the 20th day of July, 1923, the Commission adopted the following order:

"Notice is hereby given pursuant to Section 315 of the Tariff Act of 1922, that a public hearing in the foregoing investigation will be held at the office of the United States Tariff Commission in Washington, D. C., at 10:00 o'clock A. M., on the 10th day of September, 1923, at which all parties interested will be given an opportunity to be present, to produce evidence, and to be heard with regard to the differences in cost of production and of all other facts and conditions enumerated in Section 315 of the Tariff Act of 1922 with respect to the following article described in paragraph 83 of Title I of said Tariff Act, namely: Sodium nitrite, being wholly or in part the growth or product of the United States, and of and with respect to like or similar articles wholly or in part the growth or product of competing foreign countries.

"This notice shall be published by posting a copy thereof for thirty days prior to said 10th day of September, 1923, at the principal office of the Commission in the city of Washington, D. C., and at the office of the Commission at the port of New York, and by publishing a copy thereof prior to said date once each week for two successive weeks in 'Treasury Decisions' and in 'Commerce Reports'."

These several orders have each been published as required in their terms. They have been posted at the office of the Commission in Washington and at the office of the Commission at the port of New York.

The Chairman: Witnesses desiring to offer testimony will now be heard. Witnesses will give their names and addresses and whom they represent.

Mr. De Vries: Mr. Chairman, I would like to say that I appear on behalf of the Norwegian Nitrogen Products Company of New York in opposition to this petition.

Preliminarily, I would like to make formal request that we be supplied with a full and complete copy of the petition herein, instead of the petition with part of the facts eliminated therefrom. I make that formal request as a matter of record, and shall present some matters to the Commission on it at a later time.

Mr. Graff: My name is C. F. Graff. I am the President and General Manager of the American Nitrogen Products Company, of Seattle, Wash.

The Secretary: Are you going to testify or appear as counsel?

Mr. Graff: I am appearing on behalf of our company, as the only counsel.

The Secretary: Are you testifying, or just appearing as counsel?

The Chairman: He appears to give testimony, and the witness will now be sworn.

Mr. Graff: I presume I will have to testify.

Testimony on Behalf of Applicant.

C. F. Graff was called as a witness and, having been first duly sworn, testified as follows:

Direct examination:

The Witness: First, with respect to the request of counsel for the opposition, to the effect that they be furnished with complete copies of our petition, and the data furnished, we object to this for the reason that we have been promised by the Commission that confidential information would be so treated. A large part of the information furnished in those briefs and data is confidential, and was so marked at the time. We are perfectly willing to give any and all data to the Commission, and have done so, but we expect to be protected under the ruling as made to that effect.

The Chairman: The Commission will protect the confidential nature of all information submitted to it.

The Witness: The American Nitrogen Products of Seattle, Wash., is an American corporation organized for the purpose of establishing the air nitrate industry in this country. We erected a plant in 1917 at or near Seattle, using the electric art method for the fixing of nitrogen from the air, which is the method also employed in Norway. We have built a plant there for the exclusive manufacture of sodium nitrite, which was the first and proper logical step in establishing the industry by this method. This plant has been developed and has grown until it is

now a thoroughly efficient plant manufacturing this product as a major product, and only product.

By the Chairman:

Q. Mr. Graff, was there any sodium nitrite produced in this country prior to the war? A. Yes, sir, there was, but not by this method.

Q. Was there any considerable quantity? A. In very small quantities in this country. It was made prior to the war in a roundabout way by what is known as the lead process.

Q. You established this plant for the production of sodium nitrite at a time when the customary source of supply was shut off because of war conditions? A. Yes, sir, in order to meet the needs of the dye industry.

Q. Sodium nitrite is used for what purpose? A. Sodium nitrite is used primarily in the manufacture of dyes, largely in the manufacture of what is called the azo group of dyes.

Q. Dye manufacturers, then, are the chief consumers? A. Yes, sir; it is also used in the paint and ink industries and by the textile manufacturers. It is an absolutely necessary element in those manufactures.

Q. A complete chemical industry in this country, then, would require an available source of sodium nitrite? A. Absolutely; and that is proven by the fact that during the war when it was impossible to import from Europe, as had always been done prior to the war in large quantities, the price of sodium nitrite rose from a pre-war level of about 6 cents per pound to 60 cents per pound.

By Mr. De Vries:

Q. Rose from what to what? A. From a pre-war price of 6 cents per pound to a maximum of 60 cents per pound. This was on account of the urgent necessity for the material on the part of the dye manufacturers.

At about that time we succeeded in getting our plant under way, and we were able to fulfill a very large portion of the demand, and the price again began to drop; and at about the time of the armistice, as I remember it, the price was down to around 12 or 15 cents a pound.

Mr. Chairman, I wish to again emphasize the fact that our plant is exclusively devoted to the manufacture of this product, and that this was a logical proposition from the manufacturing standpoint in the early stages of the game. The company is aiming and expecting to enlarge its plant and build another plant where the product will be made, not as a major product, but more or less as a by-product, as is now done in Norway. In Norway the Norsk Hydro Kvaelstofaktieselskab of Kristiania, Norway, is a very large concern, which was begun in or about the year 1903, copying a method for the fixing of nitrogen from the air which had previously been experimented with by Messrs. Bradley & Lovejoy, Americans, at Niagara Falls. The Bradley-Lovejoy attempt at Niagara Falls failed largely on account of financial troubles; also on account of practical difficulties. Dr. Eyde of Norway, and Prof. Birkeland, of Kristiania, Norway, then began a somewhat similar—in fact, the same process, using a different form of arc, and they succeeded in developing this highly efficient commercial method of fixing nitrogen. They have built a plant over there of huge proportions, raising the capital primarily in France. The latest report I had on the investment was something over $50,000,000. They have a plant there which is not a sodium nitrite plant, as such. It is a fertilizer and acid plant, and they manufacture their sodium nitrite as a by- or end product. In other words, they cannot help but make it. The process, briefly, Mr. Chairman, is to burn the air in furnaces, making a nitric oxide gas, that is, a combination of the nitrogen and the oxygen in the air, which combine chemically, making a nitric oxide gas, and this gas is then oxidized and passed through absorption towers, where they manufacture acid, catching the gas in water in the towers; but all of the gas cannot be caught in the water. Some of it escapes, and in order to catch the escaping gas they circulate a soda solution in the water in the last tower, which gives them the sodium nitrite as an end product. This sodium nitrite can then again be treated with nitric acid, and made into a sodium nitrate, which, of course, involves an extra cost. So, the Norwegians, in disposing of their soda product, or end product, will sell all that they can as nitrite, because of the fact that that brings a higher

price, and that which they cannot sell as such they will transpose by acid into a nitrate and sell that in competition with the Chilean nitrate, or fertilizer which comes here from Chile in enormous quantities. So, Mr. Chairman, from the standpoint of cost it really makes no difference to the Norwegians whether they sell the nitrite as such or as nitrate. In reality, it makes no difference whether it is sold as nitrate or nitrite. They will get what they can, of course, for the nitrite as such, and the more they get, the less the price of the primary product, which is the fertilizer.

By Commissioner Burgess:

Q. You have no by-product by your process? A. No, sir. As the result of this ability on the part of the Norwegians to sell the product very cheaply, the domestic manufacturer of nitrite has been in severe danger for a long time.

As soon as the shipping began across the Atlantic Ocean after the war, the product again began to arrive in this country and the price was forced down so that we could not compete. We then appealed to the House Ways and Means Committee for relief under the then proposed Fordney Tariff Bill, submitting briefs on that subject, and that is part of the record here, I believe, where we asked for a duty of 5 cents per pound. The House Ways and Means Committee fixed the duty at 3 cents. When the bill went before the Senate Committee they also fixed the duty at 3 cents per pound, and it came out of conference at that figure; whereupon Senator Jones of Washington, who was thoroughly conversant with the industry out there, and our trouble, had the 5 cents per pound duty passed on the floor of the Senate. They decided in favor of the higher rate, but this rate was again revised downward the following day, largely on account of personalities passing on the floor, so that the duty remained at 3 cents per pound.

After this we took the matter up with the War Trades Board, who exercises like control over the importation of dyes. For some reason sodium nitrite had been eliminated from the schedule of dyes, although it is a primary product in the manufacture of dyes, and when this was shown to the War Trade Board, considering the importance

of the product to the country, they issued an order including sodium nitrite under the license control.

When the emergency tariff became effective, a month or six weeks later, it was, of course, still protected under this emergency tariff, and the protection remained until the time of the effectiveness of the permanent tariff, September 21, 1922. Up to this date the importations, of course, were stopped or controlled, and we again came into the market and were able to so something.

As soon as the permanent tariff went into effect, September 21, 1922, large quantities again began to arrive, and the price—I have a schedule showing those importations, but I think that has been submitted to the Commission. At any rate it came in in large quantities and the price went down, so that we could not compete. Then is when we appealed for relief to the United States Tariff Commission, submitting our first brief on October 24, 1922. We followed this by another brief or two later, on January 22nd, I think, and February 9. I dignify them by the name of "briefs," merely because they were rather voluminous. They were, in fact, nothing but long letters and data.

We also took it up directly with the President, and the President wrote a letter to the Commission requesting expedition of this matter in view of its urgency. We also had a letter from the President on that subject.

We were told by the Commission that under the procedure it would be necessary for us to submit our actual costs of production, which we did. These costs were afterwards verified by a visit on the part of two experts from the Commission to our Seattle head office, and to our La Grande plant, the plant having, in fact, been also previously visited by Mr. Costigan, of the Commission, who directed the investigation to proceed.

Having submitted these costs and all the data requested, we were then advised that the Commission found it necessary to investigate foreign costs of production as a basis for comparison, and we were told that it would still be several months before action could be had.

The Commission's experts then proceeded to Europe, including Norway, I believe, and Germany, and, as I understand it, they secured certain data and are now here to discuss the matter.

Mr. Chairman, the costs of domestic production of nitrite submitted, as compared with data and evidence furnished as to the costs of foreign production, justify fully the increase asked by us of 50 per cent, or another 1½ cents per pound, making the total duty 4½ cents per pound.

We therefore ask that this increase be granted, and, in view of the length of time consumed, and in view of the great emergency for protection, we would also request that the matter be fully discussed here today and concluded, and the recommendation go forward to the President.

By the Chairman:

Q. Mr. Graff, as I recall, you said your plant was established in 1917? A. Yes, sir.

Q. Can you give us, briefly, an account of your operations from that time, how much sodium nitrite was produced the first year of operation, and what the production has been since? A. I beg your pardon, Mr. Chairman?

Q. Can you give a brief statement of the amount of sodium nitrite produced by your company since 1917, when your plant was built? A. I will answer it in a general way. We have produced several thousand tons. We have produced a great proportion of the country's requirements, and our capacity now constitutes a great proportion of the country's requirements.

Q. Can you tell us what is the amount of sodium nitrite required by the chemical industry and other industries using it in this country? What is the total demand for sodium nitrite in this country, and how much of it is your plant capable of supplying? A. We are capable of supplying a majority of it, over 50 per cent of the total requirements, and the total domestic production in this country is able to take care of the country's requirements. You understand that there are two or three other manufacturers of the product besides ourselves. We have, Mr. Chairman, furnished very complete data in detail as to our particular capacity, but, as stated before, we have been promised that this matter would be treated confidentially, and I would like to have it remain that way, if you please.

By Commissioner Burgess:

Q. The matter of the total consumption of nitrite in this country is not a confidential matter? A. Oh, no, sir; no in-

deed. As I stated, the country's consumption is several thousand tons; we will say, between three and five thousand tons per annum.

Q. The total demand? A. The total approximate consumption in this country. I presume that your own experts have verified those figures, and will probably confirm me on that. What I stated was that our production capacity constitutes over 50 per cent of the requirements, and that the entire domestic production in this country will approximately take care of the country's consumption, because there are other manufacturers.

Q. I understood you to say, Mr. Graff, that a large percentage of the Norwegian production went into fertilizer. A. No, sir; not of sodium nitrite.

Q. Didn't you mention fertilizer? A. But they transpose the nitrite by treating it with acid. When they cannot sell it as nitrite, they treat it with acid and make it into nitrate, and sell that as fertilizer.

Q. What is their main product? A. Their main product is fertilizer, calcium nitrate.

Q. That is what I understood; and the nitrite is a by-product. A. Both the nitrite and the nitrate are by-products with them. Their main production is calcium nitrate, which is a fertilizer. That is their primary product.

Q. In that way they can produce the nitrite at a much reduced cost as compared with your cost? A. Yes.

Q. We use fertilizer in this country to a very large extent. Is there any reason why you can not follow the same process and reduce your cost of the nitrite? A. Absolutely not; and that is what we are aiming at. We intend to do that very thing, but it will take time. There is a great deal of discussion in this country as to what may be done along this line, but it can be done in our western territory, where we have water power, and that is our purpose. But, as I explained before, our first step was to produce nitrite as a major product, because we could handle that at the time, whereas, with the production of nitrite, which we now have, we were compelled to only put in a fairly good sized plant. If we had put in a plant for fertilizer, expecting to mix it as a by-product, we would have had to put in a plant approximately seven times as large, and that we can only do after demonstration of our proposition as now conducted, the feasibility of our furnaces, and our general operations.

Q. So that the development of a fertilizer plant or outfit would require reorganization, recapitalization, and enlargement? A. Simply enlargement, yes, sir.

Q. About how long a time would that take to put it in that shape? A. We do not think that will take very long now.

Q. About how long? Six months, or a year, or two years? A. Mr. Burgess, I would say that that would depend largely on our success in marketing our product. If our success in marketing our product and sales is no better in the future than it has been in the past year, there is not much chance.

Q. What I am getting at is this. If additional protection is given to the industry at the present time, it perhaps would only have to be a temporary help and protection. A. We naturally expect to reduce our costs in the future.

By the Chairman:

Q. In reply to my question, Mr. Graff, you stated that the domestic producers of sodium nitrite would be able to supply practically the entire American demand. The next question I would like to ask is, could that be supplied at a reasonable price? A. Yes, sir.

By Commissioner Glassie:

Q. What do you mean by "a reasonable price"? A. I think that a reasonable price is the pre-war price plus the ordinary increases in the general market, approximately speaking.

By the Chairman:

Q. By "reasonable price", naturally I mean a price that corresponds reasonably with the record of prices during the times of normal production. A. Yes, sir.

Q. You testified that the price during the war went as high as 60 cents a pound. It is now about 12. A. As matter of fact, Mr. Chairman, at the present time the price is not a reasonable one at all, when judged from that standpoint. Other materials are all up. Sodium nitrite is down to almost the pre-war price, and the reason for that is that the foreigners, in order to overcome the extra duty of 2½ cents per pound over and above the Underwood ½ cent per pound, are selling it in this country at a lesser price than they are in their home markets, in the European

markets, and when that was brought to the attention of the Anti-Dumping Unit, acting under the Anti-Dumping law of 1921, they recently issued instructions to the appraisers at the ports of entry to withhold appraisement entries on this product. I cite that as a side light on the general proposition. It does not, of course, come within the province of this Commission to deal with that question, but it is being dealt with by the proper authorities.

By Commissioner Burgess:

Q. What is the present price, Mr. Graff, approximately? A. Mr. Burgess, the present price is one which would have to be specified within certain limits. In other words, a price on a small lot, an offhand price, is one price. Another price is an inside price on a desirable contract. These prices at present range from 7 to 8 cents per pound. When a desirable contract is fought for, the price is forced down. I want to emphasize further the fact that with our large capacity, if we are not able to secure the good sized contracts we might just as well be out of business. We cannot, with our capacity, sell in retail, or in small lots to the ordinary small consumers in the eastern market, which, of course, is our sole market. If we are deprived of the larger contracts, of which there are only a very few in this country, say three or four or five, then we are out of the running, and it has been our experience during the past year that when we fought for those larger contracts, we were beaten, absolutely beaten.

By Commissioner Culbertson:

Q. You think that a 1½ cent increase in the tariff will enable you to get those contracts? A. Yes, sir.

Q. You will, I assume, increase your price by the amount of the tariff. That would be your idea, would it? A. Not necessarily, Mr. Culbertson. We think that approximately that increase is necessary, but, as we succeed in reducing our costs, we are simply going to aim for a fair profit, and I would not put it just that way. Our sole purpose, Mr. Chairman, is to secure a reasonable profit during this time of our growth, and when we have enlarged our plant and can manufacture the product at lower prices, the consumers will certainly get the benefit of it. But we cannot

proceed, failing to pay dividends, and borrowing money, etc., and keep up the fight any longer.

Q. I would like to have you answer that question, Mr. Graff. It is very vital. You are the chief producer of this product in the United States, are you not? A. I think we are.

Q. And in that position you would be able to take full advantage of any tariff levied on a competing foreign product, would you not? A. We hope to.

Q. As I understand it, you feel that your costs are so high now that you cannot sell and make a profit at the present prices? A. Yes, sir.

Q. Therefore you will have to increase your price, will you not, in order to make a profit? A. Yes, sir; we expect to increase the prices now prevailing.

Q. And the thing that will enable you to do that is the additional 1½ cents' protection that you are asking for? A. We think so.

Q. I would like to ask you a little concerning your company, the American Nitrogen Products Company. What are the physical assets of that company, in value? A. That, Mr. Culbertson, is given in the data furnished. We have shown all of that in the record.

Q. It is a matter of public information, is it not, so that you have no hesitancy in stating it now? A. We would prefer not to go into those figures in front of our competitors, if you please. The information is in the record, and——

Q. (Interposing.) I think it is fairly important that some of that information be brought out. You have a plant in Canada, have you not? A. Not now.

Q. Is that plant being scrapped? A. We had a plant there, and when the necessity for an increase on sodium nitrite duty became apparent, this plant in Canada, also manufacturing sodium nitrite, we were caught, as it were, between the devil and the deep sea. We had to choose between protecting our American plant by an increase in duty, and the scrapping of the Canadian plant, which, of course, was meant, because any duty increase would apply to Canada as well as all other foreign countries, and letting the then ½ cent per pound duty remain and taking

the chance on the competition from Europe. We chose the former.

By the Chairman:

Q. And the possibility of scrapping your American plant? A. It meant the destruction of the property of both plants. We chose the former, Mr. Chairman, deciding to place our sole reliance upon the American plant, and we show a loss of some $400,000 in scrapping the Canadian plant.

By Commissioner Culbertson:

Q. I understand, then, that you have no assets in Canada at all? A. No, sir.

Q. Not as a company? A. No, sir.

Q. To whom was that plant sold? What was done with the Canadian assets? A That, Mr. Culbertson, was handled with our Canadian creditors.

Q. I do not have any idea how large your American plant is, what the physical assets are, and it is a very vital question, it seems to me, in view of the fact that you are the only, or the major producer of this product, and the only producer of this product by the arc process. You ask that the duty be increased. The public is entitled to know how much physical assets there are asking for this protection. Do you see my point? A. Yes, sir. May I show a photograph of the plant without inserting it in the record?

Q. I think I have seen pictures of your plant.

By Commissioner Glassie:

Q. If this information Mr. Culbertson is asking about, which you do not seem inclined to give here, is in the record as a part of the work done by our investigators—— A. (Interposing.) Yes, sir.

Q. (Continuing:) Would you have the same objection to our making it public as a part of the facts in the case? A. Mr. Glassie, that is the very point; we were assured it would not be disclosed publicly.

Q. You regard, then, the statement of your capital assets as confidential, as well as the costs of production? A. Yes, sir; so far as the general public or our competitors are concerned, we feel that way about it.

Q. Are you not compelled, under the local State law, to make some report as to your capital assets, liabilities, etc.? A. Not our State, so far as I know.

By Commissioner Culbertson:

Q. What I want to know, Mr. Graff, is this: I want to develop this point. I want to know, either from you now, or subsequently, what the value of your Canadian plant was—I mean the physical value—and how much you got from it in the scrapping; what the value of your American physical assets is. Then, I would like to know—perhaps you will answer this now—how much of your capital value consists of patents and good will. You have a capitalization of this company, have you not? A. Yes, sir.

By Commissioner Culbertson:

Q. Could you give me the proportion of that capitalization which is represented by physical assets, and the proportion which is represented by patents and good will? A. That is all shown in detail in the record. We have given that very information, and it was verified by the Commission's experts in our offices.

By Commissioner Glassie:

Q. It is available already to the Commission? A. Yes, sir.

Q. But it is not available to the other parties interested in this hearing? A. We do not feel, in view of our circumstances and the conditions, that that should be submitted to our competitors.

By the Chairman:

Q. Mr. Graff, the important point is, is your plant an efficient plant? A. Absolutely.

Q. Can it produce sodium nitrite at a comparatively low cost? A. As compared with other domestic manufacturers, yes, sir; and it represents a very substantial investment. I have here a photograph showing the plant (exhibiting photograph). I will say this. The investment represents several hundreds of thousands of dollars. I will go that far.

By Commissioner Culbertson:

Q. I have here the balance sheet of your company for 1920, which purports to give the capital assets and the current assets and the deferred charges; also the capital stock, current liabilities, deferred liabilities, and the surplus. The total capital stock outstanding is $1,229,500. The common stock authorized and issued consists of $750,000; preferred stock, 7 per cent cumulative, authorized, $9,250,000, less unissued, $8,770,500——

Commissioner Glassie (interposing): May I ask if that is in the record?

Commissioner Culbertson: It is called "balance sheet and income expense statement, 1920, of the American Nitrogen Products Company."

The Witness: Excuse me, Mr. Chairman. We were assured that this matter would be treated confidentially.

By Commissioner Culbertson:

Q. This is not confidential. This is a public document. A. No, sir; absolutely not. It is for our own stockholders.

Q. I assumed that when a thing was published, it was distributed. A. That was simply our financial statement sent out to our stockholders; but the information is all there, and I will be glad to answer any and all questions the Commission may have with regard to the whole matter. There is nothing that we wish to hide in any manner, shape or form.

Q. I do not think that an ordinary balance sheet would be considered as confidential matter under the statute, so that I do not feel that there has been any violation. A. It discloses our profits, our losses, our operations, and the entire history.

Q. Nothing that I have said discloses that. A. Do not misunderstand me, please. I am perfectly willing to go into all these questions with the Commission, but, standing here as I do in front of our competitors, who are able to take advantage of anything and everything, we do not feel——

By Commissioner Glassie:

Q. (Interposing.) Am I clear in understanding that everything you have been asked about is in the record? A. Yes, sir.

Q. And was obtained by the investigators sent out by the Commission? A. Yes, sir.

Q. And that your sole point is, not that the Commission shall not have it, but that your competitors shall not have it? A. Absoluetly.

Q. Then, the question whether any of this should be made public would have to be dealt with by the Commission as whole, and they would have to pass upon it as to its confidential character and take the responsibility of making public such part as they did not regard as confidential?

Commissioner Culbertson: I may say that there came addressed to the Tariff Commission on Saturday a telegram, which I supposed would be here this morning. I do not have a copy of it here, and I cannot give the contents of it, except in a very general way. It was addressed to the Commission, and it was signed by the preferred stockholders of your company—at least someone speaking for them. It was——

The Witness (interposing): How many, Mr. Culbertson?

Commissioner Culbertson: I do not have it, and that is the difficulty.

The Chairman: Excuse me a minute. A telegram has been received. It is the intention of the Chairman to call that telegram to the attention of the Commission at an executive session. Until the Commission passes upon the telegram, and whether it is to be admitted into the record or not, I will rule that reference to it is not in order.

Commissioner Culbertson: I only want to say that this telegram stated that these parties wanted it read into the record at this hearing, and I do not think the full information can be adduced concerning this situation unless we have the information which was referred to in that telegram discussed here. I should think that Mr. Graff, above all others, would want that information before this hearing.

The Witness: Mr. Chairman, may I answer——

Commissioner Glassie (interposing): I suggest, Mr. Chairman, that the Commission go into executive session and consider this thing and see whether it is in or out, so

that we will all know exactly what the situation is. I have never seen the telegram and do not know anything about it. If it ought to be part of the record, then the Commission ought to deal with the question and direct it in, or order it out.

The Chairman: It is my intention to ask the Commission to go into executive session at the conclusion of this morning's hearing, and if we decide to put the telegram in the record, it could be so disposed of this afternoon.

Commissioner Culbertson: Mr. Graff may want to answer this telegram.

The Chairman: Mr. Graff will be here this afternoon.

The Witness: Mr. Chairman, I wish to answer it if it is in order, in executive session. I am satisfied I can answer it and explain it fully.

Commissioner Glassie: Normally, a mere telegram would not be evidence, I take it, anywhere. The identity of the party sending it would not be proved by the receipt of the telegram, and the question as to whether it is admissible or not would have to be passed upon by the Commission as a whole. I do not know anything about this telegram, but, as I understand it, there are two sources of information before the Commission. One is the information collected by its investigators. The other is the sworn statements of parties before the Commission, and this does not seem to fall within either one or the other. But if it is competent, then it ought to be known at an early stage, I submit, Mr. Chairman, so that we will know whether it is in or out.

The Chairman: I expect to adjourn the hearing temporarily and have the Commission pass upon that question. I should have brought it to the attention of the Commissioners prior to the opening of this hearing this morning, had all the Commissioners been available. As they were not, I decided to call it to their attention at an executive session of the Commission immediately at the conclusion of this morning's session.

The hearing will stand adjourned until 11:30, and the Commission will meet in executive session.

(Whereupon, at 11:00 o'clock a. m., the hearing was temporarily adjourned and the Commission met in execu-

tive session, at the conclusion of which the hearing was resumed, as follows:)

The Chairman: Is it agreeable to all parties interested in these proceedings that the hearing continue at this time? The full time for adjournment has not elapsed. We will continue or we will wait until 11:30. If there is no objection, the hearing will now be resumed, and the Commission will report that it has considered the question in executive session in regard to the competency of the telegram that has been sent to the Commission, and it has decided that the telegram is not of the character of evidence and is not admitted in the record. Mr. Graff, you may proceed.

Commissioner Culbertson: I would like to ask a question or two.

By Mr. Culbertson:

Q. Mr. Graff, do you know a man by the name of Christian Tjosevoig? A. Yes, sir, I do.

Q. Who is he? A. He is a man who was a stockholder but who is not now a stockholder of record, who is dissatisfied because of the fact that the company has not paid its dividends.

Q. What did he do with his stock? A. He disposed of it.

Q. Did you buy it? A. No, sir.

Q. Did anyone connected with the company? A. No. I think he set it over to certain other parties in order to escape judgments against him.

Q. Do you know of the preferred stockholders of your company having a committee of any kind? A. I do not; no authorized committee to act in such matters at all.

Q. Have they taken any action with reference to their alleged interest in your company? A. They endeavored to bring trouble for us. This man, I mean, endeavored to bring trouble for us, yes, sir.

Q. Have they started any legal proceedings of any kind? A. Mr. Chairman, how far should I answer questions of this nature in regard to this matter?

The Chairman: I think the questions so far are proper and throw some light on the situation that your company is in, and the Commission will be glad to have you be as

frank in your replies as you think that your own interests will permit you to be.

Mr. De Vries: In this connection, may I suggest, Mr. Chairman, that all that is contained in the copy of the petition which we received is the following allegation:

"That the profit assumed above the one-half cent per pound equals $24 per ton, which, on one hundred tons monthly production is $2400 or $28,000 per year. Our outstanding capital stock, fully paid up, is $1,229,500. The above profit is therefore merely nominal and would be entirely inadequate for a dividend."

It seems to me it is very pertinent to inquire just exactly what of this capital stock was paid by the company and what it represents, and what the assets are behind it; whether it is worth one cent on the dollar or a hundred cents on the dollar.

The Chairman: You will have an opportunity to question the witness.

Mr. De Vries: I just wanted to supplement Mr. Culbertson's inquiry, as to the pertinence of it.

Commissioner Glassie: You were reading from the petition of the applicant, were you?

Mr. De Vries: Yes, sir.

Commissioner Culbertson: Which is not public property, of course?

Mr. De Vries: That is the limited portion of it, which we were furnished.

Commissioner Culbertson: Now, Mr. Graff, will you answer my question, please?

The Witness: Yes, sir, I will be very glad to answer you. Tjosevoig, as I said, was dissatisfied, and interested another man by the name of Newhall, who is a chemist and a former employee of ours, and began to make trouble for the company, the purpose of which was to wrest control and secure it, presumably, for themselves, in some manner, shape or form.

By Commissioner Burgess:

Q. That was before he disposed of his stock interest? A. Afterwards.

Q. After? A. Yes, sir. I may say that he disposed of his stock interests to some of his relatives for one thing; simply set it over in order to escape judgments; so that he could not be gotten at, and when the company failed to pay its dividends, on account of its struggles, they began this trouble, and there was no way that they could very well do it except through our creditors. They scouted around amongst our creditors and tried to get an action started for receiver. In fact, they did succeed in having an action started for a receiver.

By Commissioner Culbertson:

Q. In what courts? A. The Superior Court of King County, Washington. That action was dismissed after a full hearing, and stands dismissed.

Q. There was a petition filed in that case, wasn't there? A. Yes, sir. It was a fraudulent petition. They had no authority, and when that was shown to the court, it fell.

Q. Do you have the petition before you? A. I did not know that this was going to come up in this manner, but I have a little newspaper clipping that corroborates my statement.

Q. What I should like to have put in, if possible, as an exhibit, is the petition in that case, or at least a statement of the facts alleged by these alleged preferred stockholders. I of course know nothing about this. I simply want to know what the financial background of your company is. A. Well, I do not have that. Furthermore, I would naturally object to that going into a public record.

The Chairman: If part of the court record goes in, I should think the whole thing would have to go in.

Commissioner Culbertson: That is a public record of course—that petition.

The Witness: The matter has been dismissed.

Commissioner Culbertson: Well, that can go in as a fact too. I am not raising it as anything except an allegation of facts.

By Mr. De Vries:

Q. Mr. Graff, there were two petitions? There was an intervening petition in that proceeding, was there not?

There was a creditor's petition and also a preferred stockholders' petition? A. Yes, sir.

Q. Now, the creditors' petition you say has been dismissed? A. Yes, sir.

Q. Has the preferred stockholders' petition been dismissed? A. I think that is still pending.

By Commissioner Culbertson:

Q. Now may I ask, in that preferred stockholders' petition, whether there is any reference to the British Columbia plant? A. Well I think there is, reciting the fact that the plant is in danger, or not being able to operate and so forth.

Q. That plant is located at Lake Bunson, is it? A. Yes, sir.

Q. British Columbia? A. Yes, sir.

Q. Do these alleged preferred stockholders have any property rights in that British Columbia plant now? Did they take it over? A. No, sir. The plant was disposed of by the directors.

Q. Well, what are the allegations of these preferred stockholders in this petition then, with reference to this British Columbia plant? A. Well, as I remember it, the allegations were that the plant was not profitable, could not operate profitably, and that there was no chance of paying dividends and so forth.

Q. Well, if it is not in existence, how could that allegation be made? A. Oh this was prior to the time that it was sold, Mr. Culbertson. You understand, this took place several months ago, and the company did the only thing it could do under the circumstances. I have explained fully to the Commission our difficulties out there, before—financial difficulties, in edeavoring to continue in the face of this competition, and that is one of them, but we still have our American plant and we are doing the best we can.

Q. Well, the information has come to me, and I think it is an important thing for you to bring out in your testimony, that this Lake Bunson plant is still possible of operation, and at least that it could be operated, and if operated efficiently would produce substantial product at a reasonable price. Your statement is that it is entirely scrapped. Now, those two ideas—I do not know which is correct—are of course inconsistent with each other and I think you ought to clear that point up. A. Mr. Culbert-

son, may I ask who has made those statements? Is that statement made in that telegram by those two parties?

Q. It has come to me from parties who claim to represent the preferred stockholders. A. Well that statement is absolutely untrue. The company does not own the plant at all. As I informed you before, the plant has been disposed of to our Canadian creditors and the matter is closed absolutely.

By the Chairman:

Q. Is the plant still intact or has it been scrapped? A. No, sir. It has been dismantled. It has been disposed of absolutely. The company has nothing to do with it and when they make that statement to you they are stating something they do not know anything about or else deliberately misstating.

By Commissioner Culbertson:

Q. May I ask whether this balance sheet which your company prints, which you say is confidential, is distributed to all stockholders? A. It was. They have not been printed in that form for a year or two.

Q. Would these gentlemen that you have mentioned, Mr. Newhall and Tjoseveig have copies of these? A. Well I really do not know.

Q. Do you know whether these facts were recited in the preferred stockholders' petition which they filed in King County? A. Which is that?

Q. The facts that are in these balance sheets, of the amount of capital stock and current liabilties and so forth. A. Why I think very likely it was referred to. As I remember it, it was.

Q. That they are public property? A. In a general way they might have been referred to there. I do not know that they went into it in detail.

Q. I feel it is very difficult for us to get any idea of the problem concerning your company without a rather frank discussion of the facts in this balance sheet. Of course, I shall not urge you to discuss them if you regard them as confidential. A. I will be very glad to discuss it with the Commission in executive session.

Commissioner Culberston: Well that is not the place where that sort of thing should be discussed.

Commissioner Glassie: You would not be present at an executive session. It would cease to be executive.

By Commissioner Culbertson:

Q. Have there been any attempts to sell stock of your company throughout the United States to the general public? A. Well several years ago when we built our plant.

Q. Who was the promoter of the enterprise? A. Principally Seattle men.

Q. Of course, the costs not being in the record, it is a little difficult to discuss the question of efficiency, but I would like to have this opinion from you: Suppose the tariff duty is increased one and one-half cents per pound on sodium nitrite, do you believe that then, with your present equipment and methods of production, you can compete with the foreign product successfully in the Eastern markets? A. Yes, sir.

Q. What is your output per horsepower year? That is the basis on which you figure your output, is it not? A. No, sir. It is figured per kilowatt year, more properly.

Q. Per kilowatt year? A. Yes, sir. That production is approximately the same as the Norwegian. It is about the same yield.

Q. You have the same yield as the Norwegian? A. Yes, sir.

Q. Is that fact confidential in the record—your yield? A. Well, certainly I would say so, except in a general way.

Q. I do not want to ask you anything that is strictly confidential. You expect however to improve the efficiency of this plant as you go along, do you not? A. Oh yes.

Q. In other words, the arc process is a more or less new development, is it not? A. Yes.

Q. In this country? A. In this country, yes, sir.

Q. They have had a long experience with it in Norway? A. Yes, sir.

Q. How many years? A. Since 1903; about that time.

Q. Is it a logical development in the application of the arc process, to produce products other than sodium nitrite? I mean as this arc process, in its application, becomes more and more efficient, sodium nitrite tends to become a by-product, and other products are produced in connection with it? Is that correct? A. Oh yes. As I stated this morning, with a large plant you would make other products primarily,

such as fertilizer; acid and fertilizer, and you would secure nitrite as a by or end product.

Q. What other processes are employed in the United States for making sodium nitrite? A. The processes I referred to this morning, which is called the lead process. That was the old process; there is also the ammonia process.

Q. In those cases is sodium nitrite a by-product or a joint product or a product by itself? A. Well it depends on how you look at it. I would say that with the ammonia process the people who are making sodium nitrite make dozens of other products as well, and it is not a by-product in the sense that it is in Norway, yet it is not a major product in the sense that it is with us. The same with the lead.

By Commissioner Burgess:

Q. More of a joint product then? A. Yes, sir.

By Commissioner Culbertson:

Q. That is what I was trying to get at. It is a joint product? Or, is it a joint product? A. Well as I say, Mr. Culbertson, it is pretty hard to define, unless I have a definition before me as to just exactly what you mean by "by-product." But, concerns make a lot of other products and nitrite is only one of many commodities that they manufacture.

Q. This of course is a vital problem you see and in the comparison of costs of production, it is a point upon which we must look to the man in the business for illuminating information, and when we come to compare the costs of production of sodium nitrite in your plant, which is the only product that you manufacture, with the cost of production of a by-product in Norway and with the cost of production of sodium nitrite as a joint product in other American plants, we need some information to guide us in making that comparison? A. Yes, sir. At the same time, the Tariff Act does not refer to that question at all.

Q. Well, I know the Act. What I want is information and not argument on this particular point. Perhaps you can submit something subsequently on that point. Let me ask you about your possible program in the development of your plant. You have suggested that you might develop your project in the West to such a point that you

would be able to make sodium nitrite as a by-product? A. We hope to, yes, sir.

Q. In the same way that it is done in Norway? A. Yes, sir.

Q. You have been in operation for about six years? A. Yes, sir.

Q. How much capital will be necessary to develop a plant such as they have in Norway, which would enable you to produce sodium nitrite as a by-product? A. We would not have to employ the capital that they have in Norway in order to do that. As I stated this morning, they have over $50,000,000 employed. It is not necessary to employ any such large capital as that in order to do it.

Q. Now, that is not an obvious thing to me, because ordinarily, costs of construction and costs of water power are higher in the United States than they are in Norway. How could you do that more cheaply? A. I think in the Pacific Northwest we have fairly comparable water power conditions. We think such a plant would be a success out there.

Q. But that does not explain why it would be cheaper for you to build a plant in the Pacific Northwest, than it would be to build a similar plant in Norway. A. Well, Mr. Culbertson, we are an American company, and we naturally would build our plant in this country. We are not proposing to build a plant in Norway.

Q. Well do you know the investment of capital in Norway, per unit of product? A. Only approximately.

Q. Could you give us an estimate of it? The investment of physical capital, per unit of product? A. Well, I would have to look that up.

Q. I should like to have that information in the record. I should like also to have your estimate of the amount of capital per unit of product—a parallel comparison. A. Which products?

Q. Well, we are talking about sodium nitrite now—but your program is to develop some kind of a plant—the same kind that they have in Norway. Make your comparison analogous all down the line. How much capital investment would you have to have in this country, per unit of product, whichever product you take, to reproduce

the same kind of a plant that they have in Norway? A. Well, it would be approximately the same.

Q. It would? A. Yes, sir.

Q. You think you could get water power to run a plant of that kind at approximately the same price that they get it in Norway? A. I think their price of power in Norway—the actual power, will be lower than our price because of the fact that they have already built and written off a large proportion of the entire cost of their plant and it is largely a matter of bookkeeping. I don't know what they would call the price of their power. It would be very low, but we do have a very low power proposition, which would justify a plant of this kind and make a success of it.

By the Chairman:

Q. Well, Mr. Graff, would not their cost of production of a plant be lower than yours, buildings, equipment and so forth necessary? A. In this country than in Norway?

Q. Would not the Norwegian costs of construction of their plant and equipment of the plant be lower than yours? A. I don't think so. I think conditions now are such that the prices in Norway are very high. Furthermore, the best power in Norway has already been developed. I do not think that any further expansion of the nitrite industry in Norway will be had. There has not been any expansion in Norway for several years.

Q. But if you were contemplating the expansion of your plant in order to go into the nitrate and fertilizer business, do you think you could put up a plant and equip it as cheaply as that plant could be put up and equipped in Norway at the present time? A. Well, I would say approximately so, yes, as far as actual cost of construction is concerned. That is, as far as nitrate factories are concerned; and as far as the actual cost of the power is concerned, I do not think that any plant in this country would compare with the power costs in Norway. No.

By Commissioner Culbertson:

Q. Do you think that the arc process can produce nitrogenous products, taking the whole range of them, as cheaply as the Haber process? A. The arc process will be the cheapest process of all for making nitric acid.

Q. Has that been demonstrated? A. Yes, sir.

Q. Is the Haber process used in Norway at all? A. No. It is used in Germany, but the British Government went into that question very fully and I have a report with me which shows the comparison of the costs of manufacturing nitric acid by the various processes, and there is an official statement there to the effect that of all the processes, the arc is the most efficient.

Q. What processes did the American Government experiment with? A. They have experimented with both the ammonia process and the cyanamid process. They have a cyanamid plant at Muscle Shoals of quite large capacity. They had an ammonia plant there which failed of successful operation; but another private company has since put in a plant and improved upon the design of this company, which I believe is a success.

Q. In planning a large project of this kind with a view to producing a series of nitrogenous products, I presume you have looked into the possibility of fertilizer made by your process, in competition with the Chilean natural nitrate? A. Yes, sir.

Q. Do you think that fertilizer made by your process can successfully compete with fertilizer made from the natural nitrate from Chile? A. We know it absolutely.

Q. Has it been demonstrated? A. It has not been demonstrated in this country, because it is not made here yet, but it has been demonstrated in Norway.

Q. Do you know what percentage of the world consumption of nitrogenous fertilizer comes from nitrogen fixation plants and what per cent comes from natural deposits in Chile?

Commissioner Glassie: You are speaking of the whole world market?

Commissioner Culbertson: Yes, of the whole world market.

The Witness: It will be several per cent.

By Commissioner Culbertson:

Q. It is negligible up to the present time, I presume? A. No, sir, I certainly would not say it was negligible.

Q. Well, you say "several per cent". A. Well, it must be remembered that in Chile they export something like

two to three million tons per annum, and 5 per cent of that would be approximately 150,000 tons per annum, and it is growing. Fertilizer made from the air process is growing very rapidly, whereas some years ago the per cent of the total world's consumption of Chile nitrate was only fractional—less than one per cent. Now, it has grown to several per cent. I think altogether at the present time it amounts to possibly ten or fifteen per cent.

Q. Having looked into it, I presume you realize that the Chilean product can, under competition, be sold for a much lower price than it is sold at now? A. Yes, sir, we have looked into that.

Q. There is an export duty levied by the Chilean Government of approximately 56 per cent of the nitrate value? A. $11 per ton.

Q. And that export tax, of course, could be reduced substantially, which would lower the price to the foreign consumer. I presume you also know of the arrangement through the Chilean nitrate committee, whereby the high cost producers in Chile are kept in the market, along with the low cost producers, so that if there was a reorganization along that line there would be a lowering of the cost to the foreign consumer of nitrogen or sodium nitrate? A. Yes, sir.

By the Chairman:

Q. As those prices declined, the flexible tariff would enable you to petition for increases to meet them, would it not? A. I do not quite understand that.

Q. As these prices of Chilean nitrates decline, and your competition from that source increases, the provisions of the flexible tariff would be available to you for petitions for increases in your duty to meet the situation? A. It would, in so far as sodium nitrite is concerned. It would not, in so far as sodium nitrate is concerned, because the nitrate comes in free.

Q. Well, if there is danger of severer competition, the way to meet it is by increasing the duty, if the country decides to maintain the nitrate industry? A. If that competition became severe, yes, I think that the country would slap on a duty; but the important thing here is that in establishing such a plant as we have in mind we will be

a factor in the future, in bringing down the costs of Chilean nitrates, which are considered too high. That is the very thing that Mr. Hoover, our Secretary of Commerce, is now working on. There will be a report submitted to this coming Congress on that very question.

Q. You look forward to a reduction in your costs of production, and a decrease in the price that you must charge for your product? A. I did not understand that.

Q. I say you look forward to a reduction in the costs of production in your product and a decrease in the price at which you will sell it? A. Yes, sir.

Q. Is your market chiefly in the Eastern States? A. On sodium nitrite it is exclusively in the Eastern States.

Q. Have you advantages in production that offset the additional transportation charges? A. Yes, sir. Our low cost of power. We have a power cost which is far less than any power cost which could possibly be secured in this part of the country, and that offsets the costs of transportation, so that we consider we have the most economic and efficient location right where we are.

Q. Have you any further testimony to offer, Mr. Graff?

Commissioner Glassie: I would like to ask him a few questions.

Commissioner Culbertson: Before I leave my statement, I ask you to consider, Mr. Graff, rather seriously, the wisdom of putting in these balance statements, even in spite of the fact that you regard them as confidential.

By Commissioner Glassie:

Q. Mr. Graff, I would like to ask you a few questions. If I do ask you anything that calls for an answer, which in your judgment, would involve a disclosure not contemplated by law, you can simply say so. Your company is organized I take it in Washington? A. In the State of Washington.

Q. You are required of course, to make annual reports to the State, are you not, as a corporation of the State? A. We are required to make annual returns to the United States Government, and file our articles of incorporation and so forth, with the State, but I do not believe that we are making annual returns to the State. That is to the best of my recollection.

Q. Have you any objection to stating whether the whole par of your preferred stock issue was paid for in money?

A. No, I have no objection to that.

Q. It was paid for? A. All of it was paid dollar for dollar.

Q. In money? A. Yes, sir.

Q. At par? A. At par; a hundred dollars a share.

Q. And out of your total authorized issue of eight millions, you issued something like a million? A. We have a ten million dollars authorized issue, and there was $1,250,000 outstanding, of which three-quarters of a million is common and the balance is preferred.

Q. How much is common? A. $750,000; the preferred, something less than a half a million; all of which was paid dollar for dollar.

Q. Including the common? A. No, sir. I mean the preferred.

Q. And of the capital subscribed and paid through preferred stock, did it all go into the installation of this American plant? A. No, sir.

Q. Did part of it go into the Canadian plant? A. Both plants.

Q. About the same time? A. Well we built the American plant in 1917 and we started building the Canadian plant in 1918.

Q. Did the Canadian plant operate in the manufacture of sodium nitrite? A. Yes, sir.

Q. How long? A. It operated making sodium nitrite for approximately a year and a half, until the competition became such that we were up against the tariff question and we had to desist.

Q. Now, during the year and a half that the Canadian plant operated, was the product of the Canadian plant marketed in Canada or in the United States? A. Exclusively in the United States.

Q. Exclusively? A. Yes, sir. There is practically no market in Canada.

Q. Substantially the same market that you were supplying from the American plant? A. Absolutely the same. We supplied practically all of the large dye manufacturers in the New England States. We had contracts and we sold to all of them, of any size.

Q. You supplied them from both your plants during the period, of course, that both were running? A. Yes, sir.

Q. Now did you begin the manufacture of sodium nitrite immediately after the American plant was in condition to manufacture? A. Oh, that was what it was designed for.

Q. You did not manufacture anything else? A. No, sir; never have.

Q. You manufactured nothing else in the Canadian plant? A. Yes. In the Canadian plant we made some nitric acid. When we stopped making nitric we endeavored to manufacture acid, by changing over the plant, but it proved unsatisfactory.

Q. But during the time that you were in full production of sodium nitrite in the Canadian plant, you manufactured nothing else? A. Nothing else, but nitrite at that time, no, sir.

Q. Now, have your costs of production dimininshed or increased within the two years? A. Well, I wish to say that our plant was closed on April 1st, 1921.

Q. You mean the American plant now? A. Yes, sir, because of this stagnation of the market. We could not operate, and we shut down.

Q. How long did you remain closed down? A. It remained closed down until last fall. It did not really begin to again operate until January 1st last.

Q. 1923? A. Yes, sir.

Q. Taking the period prior to April 1, 1921 and your period subsequent to January, 1923, which shows the larger unit cost? A. Prior to April 1, 1921, shows the higher cost. We have a lower cost now than we did then.

Q. Has your labor cost increased or diminished in the second period as compared with the first period? A. It has diminished.

Q. Has your power cost remained constant? A. Yes, sir.

Q. That is, what you pay for a given unit of power has remained constant? A. Yes, sir.

Q. Do you mind stating whether or not your contracts for power or your license or easement or whatever it is under which you get your power, is permanent—perpetual? A. Oh, it is not. I do not think any power in this country is permanent.

Q. You have no interest in the source of the power? A. No, sir.

Q. Is it supplied by a company which is subject to the public utility law of the State, and therefore bound to give you power at a reasonable rate, or is it purely a private contract? A. Well, we obtain power frrom two or three different sources. We are able to draw power from more than one source, and the development of power out there is such that we fell reasonably certain as to a power supply in the future. In fact, our supply in the future will be better than it has been in the past.

Q. Do you have contracts for it, or do you have contracts which are adjustable from time to time by public authority? A. No. We have certain contract arrangements.

Q. They run over what period? From year to year? A. Well, it is a little difficult to explain just how we operate.

Q. Well in a general way I want to know what your relation to the power is. A. Well in a general sense, we feel secure on that point, and our future conditions will be better than they have been in the past.

Q. I think you said that you supplied the greater part of the domestic product? Is that correct? A. We think we are the largest domestic manufacturers. We do not know exactly what the other manufacturers turn out but we have reason to think that we are the largest.

Q. How many other American manufacturers are there beside yourself? A. There are two or three.

Q. Has any one of them joined with your company in this application, or in support of it? A. We have had nothing to do with them. They have certainly not joined with us because our application is individual.

Q. I think you stated in answer to some questions put by someone else, the total American demand for the sodium nitrite—the average annual demand. I will ask you during the period of your suspension, if you happen to know how that was met? A. That was met by importations.

Q. It was not met by increased production in the other American plants? A. Oh, no. In fact, the importations from Europe were such that the stocks accumulated, and prices went down, and there was absolutely no incentive for anyone to operate in this country. We had to await the depletion of the stocks and await tariff action and one thing or another before there was any cause for continuing.

Q. Is it the practice of your trade to make up quotations of prices on sodium nitrite so that manufacturers may know from period to period what the current prices are? A. No, sir. We quote in each particular case. We quote according to the requirements and conditions at that time.

Q. The requirements and conditions and terms? A. Yes, sir.

Q. In which of course, time and quantity are important elements, I suppose? A. Yes, sir.

Q. Is there any way in which a person thinking of embarking in this business, or called upon to consider it, can find fairly accurate information with respect to prices at which sales are being made? A. Oh yes, that is very easily obtainable in the technical journals in their quotation lists.

Q. What is the source of their information? A. The source of their information is presumably from the various brokers and people who sell nitrite around New York City. They have never asked us for direct information, but they presumably get it from sales that are being made and quotations that are being made by various brokers.

Q. Then in spite of the fact that you quote your prices according to the conditions of the particular contract, there is such a thing as prevailing price of sodium nitrite from period to period? A. Oh I think so, in a general way.

Q. Well what is it now? A. It is now, according to the journals, 7¼ and 7½ cents per pound, which are merely general prices.

Q. In other words, it circulates about 7¼ to 7½ cents per pound. A. Yes, sir.

Q. Has the average market price increased or decreased since January 1, 1923? A. It has decreased. I might say that at this time, or prior to that time the price on domestic nitrite was from 9 to 10 cents per pound and it was only forced below that figure because of foreign competition.

Q. Then the domestic nitrite, in the period prior to January 1, 1923, averaged what? A. From nine to ten cents. That is what it was being quoted at in the journals and on the market.

Q. Now, who handle the importations of sodium nitrite in the American market? A. From the foreign countries?

Q. Yes. A. It is brought in by either the agents of the German manufacturers, Badishche Company or by the rep-

resentatives of the Norwegian company or the Swiss manufacturers.

Q. Well, taking the Norwegian company for instance, as far as you know, do they sell directly to the dye manufacturers through their own exclusive agents, or do they sell through brokers? A. At the present time they have their own exclusive agent or company in New York City, called the Norwegian Nitrogen Products Company.

Q. That is the selling company for the Nosk Hydro Company? A. Yes, sir.

Q. And is the same true of the Badische Company and the Soda Fabrik? A. Yes, sir. They are represented by Korttoff-Peckhardt Company.

Q. What is the custom of the trade with respect to mode of competition between the American producer and the importer of the foreign article? How do you meet any competition, as to mode? How is it carried on? A. Well I might illustrate it this way: For instance last spring, about February 1st we learned from our New York agents that the Du Pont Company was in the market for their future requirements, said to be some fifty to seventy-five tons per month, and we were invited to make a quotation. The importers were also invited to make a quotation. This was a good, substantial tonnage, desirable business. In fact, very desirable. We had been looking forward to it for about a year previous to that time; and we made a quotation. We were informed by the Du Pont Company that our price, which was as low as we could possibly make, was absolutely out of the question; that they could buy the foreign material at a considerably less price.

Q. But you were not informed what that price was, of course? A. Yes, sir. I have submitted that to the Tariff Commission in confidence.

Q. Well, what your price was?

Mr. De Vries: We have no objection to his quoting the prices.

The Witness: We have submitted both prices in the data.

By Commissioner Glassie:

Q. The price you bid and the price you were told the importer bid? A. Yes, sir, and the price at which it was finally contracted was far below any figure that we could

make, and was far below any price at which they were selling in other countries.

Mr. De Vries: Mr. Chairman, as representative of the company that obtained that bid, we have no objection to stating what it is.

The Chairman: Well you will have your opportunity to state it if you want to do so.

Mr. De Vries: I wanted to offer him this opportunity.

Commissioner Glassie: You may ask him for it if you like, if he knows. I cannot take advantage of your waivers.

By Commissioner Burgess:

Q. Looking at it in another way, have you any objection to stating how much you were under-bid? A. Well, we were under-bid so much that they took on the contract below our costs.

Q. Would that amount to more than a cent and a half a pound? Were you under-bid more than one and one-half cents per pound? A. The actual under-bidding was less than one and one-half cents per pound.

Q. Approximately a cent and a half? A. For the reason that in order to take on that contract we made—I have also explained this to the Tariff Commission—we made a figure which was irrespective of our cost, before we let go; and that was the case in one or two other instances, where we have been forced to take on—it would cost us more to discontinue manufacturing than to carry on until we could get relief. We have taken certain contracts and sold nitrite at below cost.

Q. You mean that irrespective of cost, it was below your cost? A. Yes, sir, our quotation was below our cost.

Q. So that in answer to Mr. Culbertson's question a while ago you would have to add, if you received a cent and a half, the full cent and one-half to your then quoted price? A. Yes, sir. We should have the full cent and a half to enable us to operate at a profit. The relief, to be adequate, will have to be in the full amount asked for.

By Commissioner Culbertson:

Q. I do not want to interfere with any line of questioning, but could you put in the record approximately the annual consumption of sodium nitrite in the United States?

A. As I stated this morning, I would estimate from three to five thousand tons per annum, but I think your own experts have possibly even better data on that in the record than we have.

By Commissioner Burgess:

Q. Now right following that thought, you stated that it would not be necessary to add the full cent and a half per pound, provided it was given additional protection. For what reason would it not be necessary? A. Mr. Commissioner, I do not know that you clearly understand me. I say it will be necessary to add the full cent and a half per pound, in order for us to operate at a profit, but in that particular case you asked whether or not the difference in the two quotations was greater than a cent and a half, and I said it was less, because we kept our price down, and named a figure that would not enable us to operate at a profit, in order to get the business and be able to conduct our plant rather than to close.

Q. But your answers do not seem to be consistent. Answering Mr. Culbertson you said it would not be necessary to add the full cent and a half, and you had some reason for saying that. I presume it was on account of being able to secure these large contracts rather than the smaller contracts. In the other case, just now, you said that you would have to add the full cent and a half. A. I do not remember making a statement to the effect that it would not be necessary to add the cent and a half. What I think was stated this morning was that in the future, as our costs decreased, it would not be necessary; but under present conditions, and until our plant is enlarged and until our operations enable the costs to come down, why, it will be necessary.

By Commissioner Glassie:

Q. Resuming, I understood you to say that you had learned or discovered that the foreign importers were under-valuing sodium nitrite. Am I correct? A. I beg your pardon?

Q. I understood you to say that importers of sodium nitrite were discovered to be under-valuing. Did you make that remark? A. Were under-valued?

Q. Were under-valuing their importation; putting it below the foreign selling cost? A. Well, I said that——

Q. (Interposing.) Well, what was the fact about it? A. I said that they had been selling in this country at lesser prices than in their own countries.

Q. What is your source of information? A. We have various sources, and the source has been so considered by the Treasury Department that they have issued the orders that I referred to.

Q. Well, exactly what did you discover? What I want to get at is, I think I heard you make that remark as I came in, and I did not grasp it. What did you find? What information did you get? A. Well, for instance, the du Pont contract was taken on at 4¼ cents delivered at Philadelphia, plus duty, which makes 7¼ cents. That is, their net price was 4¼ cents delivered at Philadelphia. At that same time the London price on sodium nitrite was around 5½ cents, as against 4¼ cents; showing a very heavy reduction made for that sale to this country, in order to secure the business and overcome the duty of 3 cents per pound.

Q. You brought those facts to the attention of the Treasury Department? A. I did.

Q. Where did you get the London quotations? A. We got that through various channels. We got it from technical journal quotations. We also had it from private quotations; private bidding.

Q. Well, have you any information in regard to foreign prices that you think ought to be submitted to the Commission, which has not already been submitted? A. We have submitted all of that in our data. We went into that whole question also. Although we did not think it was really within the province of this Commission, yet we gave it as a side-light on the whole issue; gave these very facts in our data. Of course, we submitted very complete information on it to the Treasury Department.

By Commissioner Culbertson:

Q. You should put in the record the citations of those Treasury decisions.

By Commissioner Burgess:

Q. Has the Treasury Department decision been rendered yet? There has been no decision, has there? A. Yes, sir, that is, there has been an order issued.

Q. But no decision rendered in the case, whether it was under-valued, was there?

By Mr. De Vries:

Q. What order has been issued? A. There has been an order issued to withhold appraisement.

Q. By whom was it issued, and when? A. By the Treasury Department.

Q. What date? A. August 20th.

Q. Is it in effect now? A It is.

Q. Have any appraisements been withheld? A. There will be if there is anything coming in. I don't think you have had anything the last few weeks.

Q. Well, we have experienced no order of that kind as yet, and we have been getting shipments nearly every day. A. Well, I will put it in the record.

By Commissioner Glassie:

Q. Can you give us reference to any order? A. Mr. Chairman, I wish to submit for the record this official letter of the Treasury Department, Division of Customs.

Q. I understand you to say that in conformity with some request made by you, the appraisements had been suspended? Is that what you stated? A. The appraisements of entries are withheld.

Q. Well, changing "suspended" to "withheld", then my question states what you stated before, correctly, does it? A. Yes, sir.

The Chairman: Will you read the letter, please? A. (Reading:)

"Treasury Department, Office of the Secretary,
Washington.

"August 20, 1923.

"American Nitrogen Products Company,
"Securities Building,
"Seattle, Washington.

"GENTLEMEN:

"Referring to your letters of the 31st ultimo and 9th instant and previous correspondence, relative to the suspected dumping of sodium nitrite, I reply that the appraisers at Boston, New York, Philadelphia and Baltimore have been requested to withhold appraisement reports on importations of this article pending the results of an investigation now in progress and further instruction based thereon. You will be informed as promptly as possible of the conclusions reached.

"Respectfully,

"J. D. NEVINS,
"*Acting Director of Customs.*"

By Mr. De Vries:

Q. What is the date of that? A. August 20th.

By Commissioner Glassie:

Q. To what extent, if at all, is this price of 5½ cents in London indicative of the average London price? A. The price we secure as the London price?

Q. Yes. As the London price at the time of this underbidding you are referring to. Was that the average London price, taken by the year? A. I think it would be if you take the London price as made at that time and as quoted in the journals, and compare them with the quotations as made in the journals in this country. That is, taking them on the same basis, it showed that that sale was made in violation of the anti-dumping act; that there was a decided reduction in price for that particular product. That holds true with respect to other sales that have been made. So, to be fair about the matter I have compared the quotations as made in the journals in that coun-

try and the quotations in the journals in this country, or I would compare the inside prices as shown by their data in that country as against this country, and it shows a violation.

By Commissioner Burgess:

Q. What is the quoted price in this country, or what was it when the du Pont people made their contract? In other words, the open market price? A. The open market price in this country at that time was between eight and nine cents per pound; it went to 7¼.

Commissioner Glassie: That is all the questions I have to ask.

By the Chairman:

Q. Have you any further testimony to offer, Mr. Graff? A. I will just make a brief concluding statement, Mr. Chairman. We consider that the industry we represent is entitled to the fullest consideration by this Commission. It is an industry of national importance. The Government in undertaking to establish this business has spent $105,000,000 at Muscle Shoals, endeavoring to establish a nitrate plant. Congress is now engaged with Mr. Henry Ford, proposing to grant him enormous concessions in order to carry on that same business. Our Secretary of Commerce, Mr. Hoover, is now engaged in extensive investigation and research for the purpose of encouraging this industry in this country. If it is encouraged and established, it will result, without doubt, in a reduction of the price of fertilizer and nitrates hitherto imported from Chile, of such huge proportions that in the year 1920 approximately two and three-quarter millions metric tons were shipped throughout the world, valued at $300,000,000, one-half of which came to this country and for which this country paid to the Chilean Government an export tax of $18,750,000. The establishment of the industry in this country means a reduction of the cost of fertilizer to the farmers.

We have begun in a modest way and we have had our struggles, of which we are not ashamed, to get the business going. We have the only electric arc plant operating in

the country. We have succeeded in developing the process until it is sufficient. We are the largest producers of the commodity. The quality is absolutely unquestioned. It compares absolutely with the Norwegian product, of which we have also submitted proof.

These are sidelights on the question. What we ask is relief under the law which says that the differences in the costs of production in this country and abroad shall be equalized; and that in considering the differences in the cost of production, the Commission is to take into consideration, under Section 315-C, the differences in the conditions of production, including wages, materials and other items of cost of production of such similar articles in the United States and other competing countries. Also take into consideration differences in the wholesale selling price of the different commodities in the different markets in the United States, which we have shown was one and one-half cents or more last fall when our relief was asked for. Also take into consideration advantages granted to the principal markets of the United States and advantages granted to foreign producers by foreign governments. Of course, that does not apply.

But also to take into consideration any other advantages or disadvantages in competition, under which would come the manufacture over there as a by-product, freight rates and so forth.

I want to emphasize the fact that the foreign manufacturers can sell nitrite, if necessary, as nitrate. They will sell what they can as nitrite. What they cannot sell as nitrite they will transpose into nitrate and can sell the nitrite, in case of emergency, at the same prices at which they sell nitrate, and those prices at the present time are 2.7 cents in New York City; from 2.65 to 2.7 cents. Those are the prices at which they are quoting nitrate in the New York market. I say, in case of absolute necessity, they could go to that same figure in the case of nitrite. So that it can be readily seen that the full amount of relief asked for is necessary. Of course, if they undertook to do that they would be violating the Anti-Dumping law and we have sought action there and are getting relief.

I think that is all, Mr. Chairman, except that I would respectfully request that you act on this matter as quickly

as possible. We have been waiting now since October 24th last; we have gone all through the stages required by the Commission. The Commission has ascertained the foreign costs and I have come 3,000 miles to attend this hearing and I have nothing to do except to walk the streets until the matter is decided.

The Chairman: Are there any questions, Mr. De Vries, which you contemplate asking the witness?

Mr. De Vries: Yes, sir.

The Chairman: I assume it will take you some time?

Mr. De Vries: Yes, sir.

The Chairman: Would you rather adjourn then at this time and reconvene at 2 o'clock?

Mr. De Vries: I think so.

The Chairman: Very well, we will adjourn then until 2 o'clock.

(Whereupon, at 12:30 o'clock p. m., a recess was taken until 2 o'clock p. m.)

After Recess.

(The hearing was resumed at the expiration of the recess at 2:00 o'clock p. m.)

The Chairman: The hearing will be resumed.

C. F. Graff, the witness on the stand at the time of the taking of recess, resumed the stand and testified further as follows:

Cross-examination (continued):

The Chairman: Mr. Graff, you had completed your formal testimony this morning?

The Witness: Yes, sir.

Mr. De Vries: I would like to ask Mr. Graff some questions.

Commissioner Culbertson: Could I ask one question I overlooked this morning?

By Commissioner Culbertson:

Q. What is your connection with the Graff Construction Company? A. I am the president.

Q. Is that a general building company operating generally in the State of Washington? A. At the present time they are not operating generally. They were up to the time that this proposition was undertaken.

Q. Did that company construct the plant of the American Nitrogen Company? A. Yes, sir.

Q. On what basis? A. On a commission basis.

Q. Cost plus 15 per cent basis? A. Yes, sir.

Q. And the profits went to the Graff Construction Company? A. The commission went to the Graff Construction Company, by the agreement entered into when the Nitrogen Company was organized.

Q. May I ask whether the wartime cost of that plant is the basis of your capital value now, in these statements that were referred to this morning? A. The plant, Mr. Culbertson, was built prior to the advance in prices. In other words, it was built in 1917, before the prices went to war prices, and I think the prices today, if it were valued on present prices, would be higher than what we have given the Commission.

Q. You say the Graff Construction Company is no longer a going concern? A. Oh, yes; they are a corporation, but they are seeking no outside work. They are giving their whole energies to the development of the nitrate business.

Q. Then, if you extend this plant as you suggest that you will, the Graff Construction Company will presumably do the work? A. That may and may not be the case.

By Mr. DeVries:

Q. They have a contract that they shall have that right, have they not, Mr. Graff? A. They have a contract giving them that right, but there is some talk about modifying that contract.

Q. You are the President of both companies, are you not? A. Yes, sir.

Q. Are the majority stockholders identical? A. Yes; the stockholders—well, partially so; not altogether.

Q. I mean the voting stockholders. A. Most of the stockholders in the Graff Construction Company are also stockholders in the Nitrogen Company.

Q. The preferred stockholders of the Nitrogen Company have no vote? A. They have only preferred stock, non-voting stock.

Q. They are not entitled to notices of meetings of the corporation? A. Not the regular meetings. They are entitled to notices of special meetings.

Q. Who owns the common stock, the voting stock? A. That is owned primarily by Seattle people.

Q. What Seattle people? A. Well, there are dozens of them.

Q. Do you and Mr. Blaine own a majority of the common stock? A. In which company?

Q. In all of these companies, or any one of them. A. No; Messrs. Blaine and Graff own 50 per cent in the Nitrate Company.

Q. In the Nitro Company? A. Yes, sir; that is, of the common stock.

Q. Common stock? A. Yes, sir.

Q. Who owns the common stock in the American Nitrogen Products Company? A. The same parties, with the addition of a couple of other small stockholders.

Q. That is, yourself and Mrs. Blaine and Mr. Blaine? A. Mr. Blaine.

By Commissioner Culbertson:

Q. Who is Mr. Blaine? A. He is a citizen of Seattle.

By Mr. De Vries:

Q. In this original contract that was made in 1915—wasn't it, Mr. Graff? A. Which contract?

Q. The contract which gave the Nitro Company the right to construct all plants for the American Nitrogen Company, of which you have just spoken. A. You mean which gave the right to the Graff Construction Company to construct plants for the Nitrogen Company?

Q. Yes. A. That was in 1915.

Q. Mr. Blaine was a stockholder with you in that? A. Yes, sir.

Q. We will come to that a little bit later, in a more orderly way.

By Commissioner Culbertson:

Q. That contract is a binding contract now, is it, still in force? A. Oh, yes; that contract is still in force, unless it is modified.

Q. It has no time limit? It does not expire? A. As I remember it, I do not think so. I want to explain, Mr. Chairman, in connection with that, that the undertaking of this project was put up by certain promoters in the year 1915, to the Graff Construction Company, and the members thereof undertook it and developed it, and a certain agreement was made as to the stock holdings and various other matters, on which conditions the Graff Construction Company and these men agreed to go ahead with the work. One of the conditions was that the Graff Construction Company, inasmuch as they guaranteed to give up all their other activities in construction work, were to do the construction work in the development of the nitrate work on a certain specified commission. We have endeavored to live up to those conditions since.

By Commissioner Culbertson:

Q. The Commission was 15 per cent? A. Yes; as I remember it, it is.

By Mr. De Vries:

Q. Just while we are on that, for a moment, Mr. Graff, there were four parties to that agreement, were there not, the American Nitrogen Products Company, the Nitro Development Company, the Graff Construction Company, and C. F. Graff and E. L. Blaine, parties of the fourth part? A. That is correct, I think.

Commissioner Glassie: It seems to me, Mr. Chairman, that if this detail with regard to these contracts is at all relevant, the contracts ought to be produced, at least in the interest of economy of time. They are not a part of the applicant's case, I take it, necessarily, and therefore there is no strict right to cross-examine with respect to them. If they are material, as they may very well be, in showing the financial background of this particular plant or this particular industry, it would be much shorter, much simpler, and much more legal, I submit, to produce the papers and have done with it. To try to produce the contents of a paper which is not produced, by verbal examination of the witness, is not legally sound, and is purely not conducive to expedition.

The Chairman: We are required to get the cost of production in this country and abroad, and in figuring costs of production capital investment, of course, is an important item. I have permitted the questions to be asked because they throw some light upon the methods and plans of capitalizing this company. If the relevancy of the testimony is questioned, the Commission will decide the point. It has not been questioned. I have permitted the questions to be asked and the witness has volunteered his answers. He was not compelled to answer, as he did not testify himself on those points.

Mr. De Vries: I submit, Mr. Chairman, that these questions are fundamental to the value of this plant which is producing this nitrogen today; what the plant cost, what was paid for it, how it was constructed, and particularly the patents under which this plant is operated.

Commissioner Glassie: Judge De Vries, is not the more orderly method of dealing with that, if the facts involved in these contracts be relevant, to ask to have them produced? To prove the contents of a paper by oral examination surely will not advance anybody anywhere if the issue be a relevant issue, because nobody would be bound by any such testimony.

Mr. De Vries: I assume, Mr. Glassie, that this witness is hostile. I assume that these are fragments of testimony which we get hold of, and that this Commission would like to know all sources of information upon this subject. If by this record we can indicate to this Commission the sources of investigation, I think the Commission would be glad to receive it.

Commissioner Glassie: I want to say for myself that I think this is a waste of public time, to attempt to go into the details of a collateral business transaction by the oral examination of a witness without the production of any documents. It is hardly necessary to go through an elaborate examination and cross-examination in detail for the purpose of indicating sources of information. If counsel wants the Commission to investigate any particular source of information, a request to that effect should be made and expeditiously disposed of, but this is the slowest method known to the law, namely, attempting to get out of the recollection of a witness the contents of a paper.

The witness is not chargeable with knowledge of the contents of a paper. His answer is absolutely irrelevant, immaterial, and inadmissible at law, and as a mode of indicating sources of information it is, I submit, roundabout, tedious, and wasteful.

Mr. De Vries: I had supposed that we were approaching the cost of production, and I have listened for two hours this morning for testimony on cost of production, and I confess I have not heard any yet. This very incident which we are asking about now concerns the assets of this company.

The Chairman: Proceed with your questions.

The Witness: Mr. Chairman, that information is all in detail in the data submitted, showing our costs of investment, showing the actual cost of the plant. Nothing is included on common stock, or any of those things. It is all given in the data.

Mr. De Vries: We do not know anything about that. We will come to it in another way, and try to expedite the matter.

Commissioner Glassie: If you think the Commission should give you this information, Judge, a request to the Commission would raise the issue and get it settled.

Mr. De Vries: I have made that this morning. It is of record.

Commissioner Glassie: We either have the right to give you this information or we have not. If we have it in documentary form and you are entitled to have it, your request upon us would have to be answered. That would be much shorter than trying to get the witness to piece out his recollection as to the contents of papers made seven years ago.

Mr. De Vries: This thing started seven years ago, and the fundamentals of it are in the transactions of seven years ago.

The Chairman: Please proceed with your questions, Judge De Vries.

Mr. De Vries: We will approach that in another way.

By Mr. De Vries:

Q. Are you operating your plant now, Mr. Graff? A. Yes, sir, partially.

Q. Why not wholly? A. We cannot sell the material at a reasonable price.

Q. How much of your output have you contracted now? How much of your output have you under contract of sale now? A. We are at the present time storing our goods because we cannot sell them.

Q. How much of your monthly output are you storing? A. We are storing all that we make at the present time.

Q. Have you any live contracts today that you are delivering under? A. I think not.

Q. Do you know? A. No contracts.

Q. Are you making any deliveries? A. They are fulfilled. We have been unable to secure any additional contracts.

Q. Are you making any deliveries? A. Not at the present moment. We are storing.

Q. How about this month? Have you made any sales this month? A. No, sir.

Q. Last month? A. I think last month, yes.

Q. What were the sales prices? A. We sold last month about 7½ cents per pound, New York.

Q. New York delivery? A. I could not say positively whether it was 7½ or 7¼.

Q. Mr. Graff, you stated that you established your plant in 1917, and at that time there were no importations. Is that your recollection? A. 1917.

Q. Yes. A. I am not sure whether there were or were not. I think there were importations in the year 1917.

Q. Didn't you make the statement that importations had been cut off by the war, and you constructed this plant to supply the domestic demand? A. By the war, I meant our entry into the war.

Q. Yes. A. They were being cut off, and in 1917 some time they had practically ceased, as I remember it, but we did not enter the war, as you will remember, until 1917.

Q. How much of the American demand were you able to supply at that time? A. 1917?

Q. Yes. A. A comparatively small proportion.

By Mr. De Vries:

Q. Your extreme capacity is around 1200 tons a year? The Witness (addressing the Chairman): Mr. Chairman, that is information which we have considered confidential, that is, our exact capacity, which is given in the data submitted.

By Mr. De Vries:

Q. We did not get it from the data you submitted, Mr. Graff, you can rest assured of that. A. We consider the exact capacity of the plant as a trade secret; also our actual costs of production, because of the fact that they, in turn, depend upon the processes and numerous things which certainly are confidential information and should not be furnished to our competitors.

By Commissioner Glassie:

Q. You have not furnished that to the Commission, however? A. Yes, sir; we have furnished them to the Commission. We have given all of that to the Commission.

Commissioner Glassie: Again I submit, Mr. Chairman, that the question as to whether this information is to be given out must be decided. The issue has got to be met, and it might as well be met definitely in this case as in any other.

The Chairman: The Commission has considered that when anyone submits information to it which is declared to be confidential, it shall observe the confidential relation.

Mr. De Vries: Mr. Graff has made the statement that during the war importations were practically cut off, and they established this plant in order to satisfy the American demand. As a matter of fact importations increased almost every year during the war, and we are prepared to show that from well-known statistics; and that the capacity of their plant is about 1200 tons a year; and that the consumption at that time was about 11,000,000 tons a year.

The Witness: I beg your pardon; 11,000,000 tons?

Mr. De Vries: 11,000 tons.

By Mr. De Vries:

Q. The present consumption in the United States, you have testified, however, is according to your idea, Mr. Graff—— A. (Interposing.) I beg your pardon?

Q. What is the present consumption in the United States? A. I think from three to five thousand tons per annum. I cannot understand where you get your 11,000.

Q. In your testimony before the Ways & Means Committee you testified at that time that the annual consumption was about 5,000 tons, did you not? A. It is possible I did.

Q. Is it greater or less at the present time? A. I was just going to say that I think at the present time it is less.

Q. Of course, as I understand your petition, one of the grounds of your petition is your ability to supply the American market. Therefore, you want this rate of duty raised? A. I beg your pardon. We are not claiming that. We are claiming that we are able to supply a very considerable part of the American market, but there are other domestic producers.

Q. What would be the equivalent ad valorem of 4½ cents specific today? A. What was the question?

Q. What would be the equivalent ad valorem to 4½ cents specific today, upon nitrite? A. If you figure it on the same basis they do in the dye stuffs, namely, on the market selling price, which is the basis for the ad valorem duty on dyestuffs, it would be considerably less than the dyestuffs are getting.

Q. That is not a frank answer, Mr. Graff, I do not think, because this is not assessed upon the American valuation, is it? A. I beg your pardon?

Q. Is nitrite assessed upon the American valuation? A. It is not assessed on any valuation; it is a specific duty.

Q. What is the equivalent of it? A. I could not tell you. It has nothing to do with ad valorem duties at all; but what I meant to say was that if you wished to transpose the specific duty of 4½ cents per pound on nitrite into percentages ad valorem, it would be less than they are getting on the dyestuffs, and, as I remember it, approximately the same, 50 or 60 per cent. I could not say offhand.

Q. What do you figure is the foreign cost, when you say that 4½ cents is necessary in order to protect the American industry? A. There are different ways of figuring the foreign cost. One way is to look upon it, as I stated this morning, from the standpoint that nitrite and nitrate cost the same to produce; in other words, that the cost of production of nitrite or nitrate will be carried on the books of the Norwegian company at the same cost, and that one can be sold at the same price as the other, because that is really a fact. They make nitrite first, and then they have to transpose it into nitrate in order to sell it as nitrate, and we know that they are selling the nitrate in the American market at 2.65 or 2.7 cents per pound, so, in one way, you might consider that the foreign cost of production, that is, the Norwegian cost——

Q. (Interposing.) What is nitrite? Is it a by-product? Do you consider it a by-product? A. In the case of the Norwegians, I would say so.

Q. Why do you say so? A. For the reason that they make it from the end gas in the last tower, and if they did not make it, they would simply let the gas go out in the air and lose it.

Q. And in your process the same as the Norwegian process? A. Not in that respect. We make it as a major product.

Q. What are the other differences between the Norwegian process and yours? Is yours a patented process, Mr. Graff? A. Well, I think only as regards the furnaces. The difference, as I stated this morning, is that they have a plant in which they make primarily weak nitric acid, and they add that weak nitric acid to limestone, which makes calcium nitrate fertilizer, and that is their primary product. In doing this, in making this acid in their towers, a certain amount of the gas goes to waste unless they catch it with soda, and that soda is what gives them their soda nitrate-soda nitrite by-product or end product.

Q. In your petition, Mr. Graff, you have alleged that your outsanding capital stock, fully paid up, is $1,229,500. I think that is correct.

Q. Is that common stock? A. $750,000 of that is common and the balance is preferred.

Q. How much is the total common and preferred stock in your corporation? A. The figure you gave is the total outstanding stock.

Q. How much is it incorporated for? A. $10,000,000.

Q. Divided how? A. Divided into nine and a quarter million preferred, and $750,000 common.

Q. Of this $1,229,500 that is fully paid up, is the common fully paid up? A. Not paid up in cash, no, sir.

Q. How much of that is common, did you say? I did not follow you? A. $750,000.

Q. $750,000 of the $1,229,000? A. Yes, sir.

Q. How is that paid up, the $750,000 common? A. That is a stock transaction in the organization of the company.

Q. What do you mean by a stock transaction in the organization of the company?

The Witness (addressing the Chairman): Mr. Chairman, should I go into all these organization details at this time? We have shown in the data submitted to the Commission the segregation of our stock; we have shown that in so far as this common stock is concerned, it is not considered at all in connection with our costs, and that the only thing that enters into this question is the question of cost, and in so far as the capitalization affects cost. We have shown in the data submitted to the Commission that only the actual investment in the La Grande plant is considered in connection with our costs, and all these questions are entirely irrelevant.

Mr. De Vries: Mr. Chairman, we can only go by the petition we have before us, and it prays for interest on this investment.

The Witness: I could talk all day on this subject, but I do not think it is going to get us anywhere, and it is presenting a lot of the company's inside affairs to the public in general, with which they are certainly not concerned.

The Chairman: I cannot see that it has any bearing upon the equalization of costs of production here and abroad, unless you are paying large, inflated dividends on an inflated capitalization.

The Witness: Mr. Chairman, there is no anxiety over dividends. We have not declared any for several years.

Mr. De Vries: We have before us, Mr. Chairman, only the petition, or parts of the petition, which alleges that

"our outstanding capital stock fully paid up is $1,229,500. The above profit is therefore merely nominal and would be entirely inadequate for a dividend." He has asked for profits upon $1,229,500 in this complaint. That goes to cost of production. We want to find out what this plant cost, what is a fair profit upon the investment, and what his labor in that plant costs, what his overhead charges are, etc.

Commissioner Glassie: Judge De Vries, the trouble about it is that those inquiries are purely collateral You are entitled to know what his cost of production is, it seems to me, at least, and he is entitled to know what the cost of production of your clients is, if you come to measure them in the final analysis, so that it means a full disclosure of costs of production of all parties to this controversy. But the Commission has not so ruled heretofore. However, if that be the sound view, nevertheless, you are not proving it, because it is common knowledge that the capitalization of these American corporations, as regards the issue of their stock, has no necessary relation with the plant investment. The plant investment is a fact that can be proved directly. If the Commission has the facts as to the capital invested in the plant, has obtained that information, the simple, direct way to get that information, if you are entitled to it, is to request the Commission to give it to you.

Mr. De Vries: That is just my position. Not having been afforded that, we are going to reach it in the best way we can. That is what we are endeavoring to do.

Commissioner Glassie: I think the Commission should pass upon your request and settle the question whether you are entitled to that, because it surely would not be able to give you by indirection what it declined to give you directly.

The Witness: Mr. Chairman, if it will help matters any, we are perfectly willing, I think, in view of what is stated here, to disclose that actual cost of our La Grande plant as given in the data to the Commission, and show that that is the only cost or investment on which cost of production has been figured.

The Chairman: That would help materially.

By Commissioner Glassie:

Q. You have already given us that? A. Yes, sir.

Q. It is in the record? A. Yes; but we have given it to you in confidence, so far.

Q. The point is not that, Mr. Graff. The point is this. How are Judge De Vries' clients to deal with the issue if that evidence is not disclosed to them? A. We say we are willing to have it disclosed. That particular item we are willing to disclose.

Q. How much of it are you willing to disclose? A. The point he is asking.

The Chairman: Will you please proceed with your questions, Judge De Vries?

Commissioner Glassie: If you are ready to disclose it, why don't you disclose it?

The Chairman: He is waiting for the question.

Commissioner Glassie: He has been objecting right straight along to the disclosure of this thing. If it is going to be disclosed, let us have it disclosed and get it over with.

By Mr. De Vries:

Q. Do I understand from that, Mr. Graff, that you are willing for us to examine your petition that is on file, as to cost of material—— A. (Interposing.) You are endeavoring, as I understand it, to get at the actual cost of investment of the La Grande plant.

Q. Exactly. A. As included in our figures on cost of production.

Q. Exactly. A. I will give you that.

Q. And the labor you employ there. A. If I have it here.

Q. What you pay for your power, what you pay for your overhead—— A. (Interposing.) No, sir; we are talking now about the cost of the plant.

The Chairman: Take one item at a time and ask the question, and see if the witness will answer. Let us make some progress.

By Mr. De Vries:

Q. What do you estimate to be the cost of your plant at La Grande, Mr. Graff? A. Without referring to the exact figures, I would say that it is——

Commissioner Glassie (interposing): Why not refer to it exactly? What is the use of having these guesses?

The Chairman: Let us have the answer, please.

Commissioner Glassie: Mr. Chairman, I seriously object to this mode of conducting the inquiry, and if it is continued I shall not participate in it. It seems to me it is wasting the time of the Commission to guess at a figure which is already in evidence.

The Chairman: The witness has not answered the question. If there is any criticism of the answer after it is made, we will entertain it.

The Witness: Approximately, our investment is $250,000 to $300,000, but I will see if I can get the exact figures here. (After examining papers:) As near as I can ascertain from the figures here, without scrutinizing them carefully, it is about $200,000, as the cost shown in figuring our depreciation, which depreciation was included in our unit manufacturing costs. The details of that information are in the file.

The Chairman: Answer, from that information, the questions the Judge asks.

Mr. De Vries: If that is the statement, might we not have a copy of it, instead of going into all this detailed examination?

The Chairman: If you want to bring out these points for the record, ask him the questions and put his answers in the record. He has answered your question.

By Mr. De Vries:

Q. Do you have a statement of the cost of your plant, the operating plant at La Grande? Do you have that statement here, Mr. Graff? A. Which cost do you refer to?

Q. The construction of the plant. A. Our construction cost?

Q. Yes. A. That is shown here.

Q. Do you have a statement like that? A. No; I have no statement; nothing further than this.

Q. What does that show? A. This shows $200,000. It was constructed in several units—$200,000, as near as I can add it up here, on which depreciation was figured. Of course, the actual cost of investment does not enter into our unit costs, except in so far as depreciation is concerned.

Q. Have you the unit cost of the labor employed in that factory? A. We have all that, but that is all information which we certainly do not consider we should give to our competitors, the cost of our labor, or the cost of our power, or the cost of our raw material, and all that. That is competitive information, and it is in the hands of the Commission. But we are willing to give you, in view of the fact that you are trying to prove that we are over-capitalized, and that we are charging in our common stock, and all this and that, against our cost of production—we are willing to say that is not so, and we have only charged in the actual cost of the plant, which is a very low one, of about $200,000.

Q. What have you estimated to be the value of your patents? A. That is information that we do not care to disclose.

By the Chairman:

Q. Is the value of your patents, or any estimate you have formed on the value of your patents, figured in in your estimated cost of production? A. Not one dollar.

The Chairman: Then, the question is not material.

The Witness: Not one dollar.

By Mr. De Vries:

Q. How much do you estimate as the cost of your power? A. We do not care to disclose our power rate to our competitors.

By the Chairman:

Q. But you have submitted that to the Commission? A. Yes.

By Mr. De Vries:

Q. Is there any State regulation in the State of Washington controlling the cost of power? A. No, sir.

Q. Is this power employed in your plant owned by you, or owned by another company? A. The power?

Q. Do you buy power? A. We are buying.

Q. You buy from another producing company? A. We buy from several sources.

Q. Do you pay any commissions upon your sales, Mr. Graff? A. Sales of nitrite?

Q. Nitrite. A. On those sales we make through brokers, yes; on those we make direct, no.

Q. Do you have an agency in New York? A. No, sir; no established agency.

Q. Do you sell through certain brokers in New York, or in the east? A. Sometimes; sometimes direct.

Q. Is Mr. Garrigues an agent of yours in the east? A. No, sir.

Q. Mr. Campbell? A. No, sir.

Q. Were they in July, 1923? A. No, sir.

Q. Have they ever been? A. No, sir.

Q. Have you ever made any quotations in the last three or four months at less than 7 cents, or around 7 cents, in the east? A. We have made quotations, that is, forced quotations, as explained to the Commission, on account of the foreign competition, between 7 and 7½ cents. Mr. Chairman, on July 2nd, for instance, on that subject we wrote to the Commission as follows:

"The strain of endeavoring to exist in the face of present stagnation in the market as a result of the heavy importations of sodium nitrite is telling on us more and more and we are writing you once more to urge all possible speed in furnishing us additional relief. We have recently found it utterly impossible to dispose of nitrite at even the low prices heretofore prevailing, namely, around 8¢ per pound and have been compelled to sacrifice material at figures even lower than this. We are disposing of some material without regard to cost in order to continue living in the hope of the increased duty but we wish to urge such relief as strongly as we possibly can. If a public hearing is absolutely necessary, can you not set the date for same within the next thirty or sixty days?"

We wrote that on July 2nd, and the hearing was set for September 10.

By Mr. De Vries:

Q. About that time did you ship any goods east, Mr. Graff? A. We have been shipping off and on up to recently, yes.

Q. Is Mr. Campbell an agent of yours in the east? A. I just answered that question in the negative.

Q. He is not? A. We have sold material through various brokers in New York, and Mr. Campbell has sold material, but he is not our agent.

Q. You have sold material through him? A. Yes.

Q. And offered it through him? A. On occasions, but he is not our agent.

Q. Did you ever make the statement to any brokers or purchasers in the east, Mr. Graff, that you could undersell any prices of any of the foreign competitors? A. No, sir.

Q. Did you authorize your agents to make that statement? A. No, sir. On the contrary, our statements all along have been to our brokers and everyone else, that we need the additional duty.

Q. In your petition under the Anti-Dumping law, since you have mentioned that, what statement did you make as to the price at which the Dupont sale was made by the Norwegian Nitrogen Products Company? A. I think the statement made at that time was based upon certain information which we had, in the nature of telegrams from New York, that we could not secure the business at over 7 cents per pound.

Q. Did you make a positive statement as to what the Norwegian Products Company received in that contract? A. We made the statement that to the best of our knowledge it was 7 cents per pound, and subsequently that we have verified from invoices and information given as to invoices, that the actual price was 7¼ cents a pound.

Q. You did not make the statement that it was 4½ cents? A. Sir?

Q. You did not make the statement that it was 4½ cents? You did not make the statement that that sale price to the Du Ponts was 4½ cents? A. I just said 7¼.

Q. I just want to have a positive answer on that one way or the other. You did not make the statement that it was 4½ cents? A. You mean net?

Commissioner Glassie: You mean duty paid.

Mr. De Vries: Duty paid.

The Witness: No, sir; it was below 4½.

By Mr. De Vries:

Q. 4¼? A. Certainly.

Q. You have made the statement to the Commission, and therefore I think some note might be taken of it, because we do not want to be prejudiced in this matter, that appraisement orders were issued and importations were being held up on appraisement orders. Do you know that to be a fact? A. No, sir; I did not say that. I said that the Treasury Department—and I read the letter—has issued instructions to withhold appraisement entries.

Q. Pending investigation? A. Yes; and that means that if you are now importing, you are taking the chance of an anti-dumping duty being assessed against you. I did not say that it absolutely prohibits importations.

Q. That is your construction of the procedure of the Treasury Department. It calls for an investigation, doesn't it? A. No, sir. That is not our construction at all. That is what the law says, and what the officials tell us.

Q. Do you know that the Treasury Department made an investigation of this matter? A. Yes, sir.

Q. And have not held up any appraisement orders? A. I beg your pardon?

Q. Do you know that the Treasury Department made an investigation of this matter, and were satisfied, and were not holding up any appraisement orders? A. No, sir; that is not a fact.

Q. You know that is not a fact? A. I know that is not a fact, because I saw the officials on Saturday.

Q. What order had they held up recently? A. I did not say they had held up any importations, because there may not be any coming in, but if one does come in, the appraiser at the port of New York will withhold the appraisement report.

Q. How long has that been the case? A. August 20th.

Q. I can say to the Commission that the importations are coming in periodically. A. The importations may come in right along. They may be assessing extra duty.

Q. I can say that is not true, in order that the Chairman of the Commission may have my statement upon that subject, after having made an investigation. A. The letter speaks for itself.

Mr. De Vries: I suppose the Commission is going to take under consideration just what portion of these statements will be shown to us for examination.

The Chairman: What we can submit, Judge De Vries, will be ready in a few days.

Mr. De Vries: And we will have an opportunity to submit contra matter?

The Chairman: You will have an opportunity. We will set a date for final hearing, at which briefs can be filed and arguments presented.

Mr. De Vries: There is——

The Chairman (interposing): Have you any direct testimony to submit?

Mr. De Vries: Not today, no.

Commissioner Glassie: Does he mean that there will be more testimony after this or not?

The Chairman: That is what I am going to ask.

Commissioner Glassie: I mean after this hearing.

The Chairman: Are there any others present who desire to offer testimony at this hearing this afternoon?

Mr. De Vries: Not this afternoon, no, sir.

Commissioner Glassie: Not this afternoon, Judge De Vries said, Mr. Chairman. The question is, will there be any more testimony, and opportunity to give testimony?

The Chairman: The hearing will come to order, please.

Commissioner Glassie: "Not today."

The Chairman: If there are no others present who desire to offer testimony, the Commission is ready to set a date for the filing of briefs and for the final argument.

Mr. De Vries: I can say to the Chairman that the testimony which we shall offer in all probability will be altogether documentary.

The Chairman: I again state that the opportunity for presenting testimony will now close, if there are no further witnesses present who desire to offer testimony at this time. The Commission will set a date upon which briefs must be filed and final argument made.

Mr. De Vries: Will we not have a right to submit documentary testimony, Mr. Chairman?

The Chairman: You will have a right to submit briefs and present argument.

Mr. De Vries: And no testimony of any kind in answer to what we may find is disclosed here?

The Chairman: I understand that is your privilege in submitting briefs and in presenting your final argument, to argue on the facts presented in the record at this hearing, and in the statement which the Commission submits to you of the facts in its possession.

Mr. De Vries: Will we have no right to submit documentary evidence in reply to the statements that are submitted?

Commissioner Culbertson: What you want, Judge De Vries, I believe, is this, the privilege to submit, between now and the time of the filing of briefs, any further information in documentary form that you may think relevant.

Mr. De Vries: Yes, and in reply to what will be exhibited to us, and which we have not had a chance to see.

Commissioner Glassie: How can that be done without the other side having an equal opportunity?

The Chairman: They do have an equal opportunity.

Commissioner Culbertson: May I suggest that either side be permitted, between now and the time fixed by you for filing of briefs, to submit any documentary evidence which they deem to be relevant, furnishing the other side with copies, as well as the Commission? Then you can fix the time for filing briefs, and the date for the final argument.

The Witness: Our evidence is all in. We have nothing more to submit.

Commissioner Culbertson: You may have some reply, however, to what the other side may offer. That is what you want?

Mr. De Vries: Exactly.

Commissioner Glassie: You want to have a chance to rebut the information upon which the Commission is likely to act?

Mr. De Vries: Exactly.

The Chairman: I think that is included in the extension of the hearing, and the setting of the date for final argument. If that is what Judge De Vries has in mind, it is what the Commission has done in other cases, and what it is ready and willing and anxious to do in this case. The Commission will set September 20th as the adjourned date of hearing, for final argument, and the final date for filing briefs with the Commission.

Mr. De Vries: Does that include the right to file contra evidence, documentary evidence in reply, in rebuttal of what is in here now?

The Chairman: It is included in your argument.

Mr. De Vries: I want to suggest, Mr. Chairman, that it is impossible for us to get our data together by the 20th. It is the 10th now, and you cannot get a letter out to Seattle and back, and you cannot get anything intelligent from Norway and back in ten days.

The Chairman: What is the earliest date you can be ready?

Mr. De Vries: I would say the 30th.

The Witness: Mr. Chairman, it seems to me that certainly ample opportunity has been given to submit evidence, and to submit everything relative to this question. The Commission's experts have been in Norway, but have been refused information as to cost of production, and now they come in here, after the hearing has been called, and ask for another twenty days. I have come east to attend this hearing, and I am willing to discuss everything at this time that is relevant, and that should be disclosed, and it seems to me that an additional week or ten days ought to be ample.

The Chairman: The Commission suggested that, and the attorney for the parties in interest has asked for further time. The law provides a reasonable opportunity to be heard, and the Commission is desirous of granting that reasonable opportunity.

Commissioner Glassie: I would like to ask you a question, Judge De Vries, if you do not mind. Do you represent the Norwegian Nitrogen Products Company?

Mr. De Vries: Of New York.

Commissioner Glassie: What is the relation of that company to the Norsk Nitrate Company, or whatever it is, of Norway?

Mr. De Vries: I understand that they are purchasers for the American markets.

Commissioner Glassie: Are they under exclusive sale contract of any kind?

Mr. De Vries: I cannot answer that at the present time.

Commissioner Glassie: Do you happen to know whether or not the Norwegian Company disclosed its cost to our agent?

Mr. De Vries: My impression is that they are the exclusive representatives in this country.

Commissioner Glassie: Do you happen to know whether the Norwegian Company made a disclosure of its costs of production to our investigator?

Mr. De Vries: Your Mr. Long could probably tell you better than I. I do not mean to be disrespectful. I do not know.

Commissioner Glassie: If you do not know, I do not expect you to state. Do I understand that if this question is gone into further, and the Commission discloses, in some lawful way, the information that you have asked for, that you desire to rebut that, or have an opportunity to rebut it, and in so doing, you will prove Norwegian costs of production?

Mr. De Vries: Those are two different propositions.

Commissioner Glassie: They are not connected in your offer at all?

Mr. De Vries: No.

Commissioner Glassie: The Commission will have no assurance that if it has not already the Norwegian cost of production, it will get it through this evidence?

Mr. De Vries: It might not be necessary.

The Chairman: Judge De Vries, I would like to extend the time as much as possible. You are interested in the question of the convenience of those involved. Would it be agreeable if we set the date at September 24?

Mr. De Vries: On that date I have before this Commission briar pipes.

The Chairman: We will set the date for further hearing September 25.

Mr. De Vries: I want to suggest to the Commission that the human system has limitations. I have three very important cases before this Commission in the next few days. On the 18th I am to make answer in the paint brush handles' case, which is an important matter to the Commission. On the 24th I have briar pipes, which requires a very extended investigation, and to bring this matter in within the next few days, I think, is quite a burden.

The Chairman: The Commission will set the date, after careful deliberation, as September 26. If no further wit-

nesses desire to be heard today, the hearing is now adjourned until September 26, at 10 o'clock.

(Whereupon, at 3:00 o'clock p. m., the hearing in the above entitled matter was adjourned to Wednesday, September 26, 1923, at 10 o'clock a. m.)

Exhibit 7.

Indorsed: U. S. Customs Court. Exhibit 7. Prot. No. 92852-G, &c. Date: 11/24, 1930. S. C. H., Reporter.

BEFORE THE U. S. TARIFF COMMISSION.

Investigation No. 7, Section 315, Tariff Act of 1922.

In the Matter of the Investigation of the Costs of Production of Sodium Nitrite.

WASHINGTON, D. C., October 6, 1923.

The above-entitled matter came on for further hearing at the office of the United States Tariff Commission, 7th and E Street N. W., at 10 o'clock a. m.

Present:

Commissioners MARVIN (Chairman), CULBERTSON (Vice-Chairman), BURGESS, GLASSIE, COSTIGAN, and LEWIS. Present also: Secretary BETHUNE.

Appearances:

Mr. C. F. Graff, President American Nitrogen Products Company, 907 Securities Bldg., Seattle, Washington, and McCumber & Sullivan, 203 Commercial National Bank Bldg., Washington, D. C., appearing in behalf of American Nitrogen Products Company.

Mr. Marion De Vries (De Vries & Doherty), 406 Southern Building, Washington, D. C., appearing in behalf of Norwegian Nitrogen Products Company, 17 State Street, New York.

Mr. A. Lundh, Commercial Counsellor, appearing in behalf of Norwegian Legation, Washington, D. C.

The Chairman: The adjourned hearing in connection with the costs of production of sodium nitrite is now opened. The Secretary will read the official notice of the hearing.

The Secretary: Mr. Chairman, on September 26th the hearing was concluded with the statement that the hearing would stand adjourned until Saturday morning, October 6, 1923, at 10 o'clock a. m. There was no publication of this order, other than its entry in the minutes.

The Chairman: The Commission is ready to rule on the requests of counsel for the Norwegian Nitrogen Products Company. The Secretary will now read the ruling of the Commission.

The Secretary (reading):

"Upon request made by counsel for the Norwegian Nitrogen Products Company on September 26, 1923, at the public hearing in the Investigation (No. 7) under the provisions of Section 315 of Title III of the Tariff Act of 1922, in respect of sodium nitrite, the Commission rules as follows:

"1. The Commission, in addition to holding a public hearing in which Judge De Vries participated as counsel for the parties of record represented by him, has submitted to the parties appearing at such hearing a written statement embodying the result of the Commission's field investigation. At the adjourned hearing, set for October 6, 1923, all parties interested, including those represented by Judge De Vries, will have an opportunity to meet the matter embodied in such statement. In so far as the first request of Judge De Vries is a request for leave to inspect the original and primary data collected by the Commission's investigators in the field and embodied in such statement, or is a request for additional information respecting the same beyond what the Commission has already submitted, the request is denied.

"2. At the adjourned public hearing, set for October 6, 1923, opportunity will be afforded all parties interested to offer any evidence they may have with respect to the matter embodied in the Commission's statement of the field

investigations conducted by its staff and such parties will have opportunity to be heard upon the same. In so far as the second request of Judge De Vries is a request to offer evidence and to be heard upon the question of the cost of power in the United States for the production of nitrites and to offer evidence and to be heard in respect of the matter embodied in the statement submitted by the Commission to the parties, the request is granted. In so far as it is a request to inspect the original cost and other data collected in the field by the Commission's investigators or the figures showing the details of individual costs of production obtained by the Commission under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

"3. At the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession with respect to the number of laborers employed and the wages paid by the American Nitrogen Products Company. To this extent the third request of Judge De Vries is granted; but in so far as that request asks for inspection of the original data showing the production costs in respect of labor of the American Nitrogen Products Company submitted by or obtained from said company under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

"4. At the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession with respect to capital invested in the American Nitrogen Products Company. To this extent the fourth request of Judge De Vries is granted; but in so far as that request asks for inspection of the original data relating to the production costs of the American Nitrogen Products Company submitted by or obtained from said company under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

"5. The fifth request of Judge De Vries, in so far as it asks for an opportunity to cross-examine experts of the Commission with respect to the costs data and other mat-

ter obtained by them in the course of the investigation in the field, is denied. But at the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession, and to be heard, with respect to the matter embodied in the Commission's statement heretofore submitted to the parties interested appearing in such investigation. In so far as the fifth request of Judge De Vries is a request for an opportuntiy to meet, by evidence and argument, the matter embodied in such statement, the request is granted. In so far as it is a request to cross-examine the Commission's investigators concerned in obtaining the matter summarized in said statement with respect to the performance of their official duties and functions in such investigation, and in so far as it is a request for inspection of the cost data and other matter so obtained and embodied in said statement, said request is denied."

Mr. De Vries: Mr. Chairman, I want to enter an exception to the ruling of the Commission in each and every particular wherein our requests have been denied. Since the last meeting of the Commission's we have, in so far as possible, diligently endeavored to gather evidence, by telegram and by cable, in such form as could be obtained in that limited time. We have gathered considerable upon that subject. But the evidence is not completely digested, and in a great measure now is in the hands of the printer, so that we would not be able to submit it at this time, but it will be completed upon Monday. The printers, of course, will not work on Sunday. We have had them working overtime at night in part, and by Monday that work will be completed and we will then be ready to submit what we could gather in that limited time to the Commission.

Mr. McCumber: Mr. Chairman and Gentlemen of the Commission: On behalf of the American Nitrogen Products Company, and for the purpose of facilitating the hearing in this case, we desire to enter an objection at this time to any further testimony being received in this case. We base our objection upon the ground of the record, as it now stands.

As I read the record before this Commission in this investigation, in so far as the matter was directly before

the Commission in the hearing here, the Commission closed the testimony upon the 26th day of September. At that time it provided that the parties should file their briefs on the 6th day of October. I refer not only to the briefs but the arguments.

I understand that it is the rule of this Commission that these briefs must be printed and submitted to the parties and to the Commission.

The American Nitrogen Products Company has complied with this order of the Commission. It has printed its briefs and argument, and has served them upon the other parties who appear as interested parties in the proceedings and filed the requisite number with the Commission.

This being the situation, and there having been, at the time when this order was made, and at the last hearing, no agreement whatever for any further consideration of this case in the matter of producing evidence, and there having been fixed this day for the presentation of briefs and arguments, the party whom we represent seriously objects to the reopening of the case at this time.

These are our grounds, Mr. Chairman, for this objection. We desire to say right here that it seems to us that either the Commission made an error in ordering us to prepare our briefs and to present them on the 6th day of October, or else it made an error, at a time when we were not present and could not object, in entering an order that one of the parties in interest might reopen the entire case.

Now, there must be an error in one of the two positions, and it seems to us that the Commission is compelled to rescind one or the other. Of course, the Commission would not expect us to be bound by such testimony, and if there were further testimony to be taken in the case, we would have, of course, the natural right to rebut it and to answer it, and it would be a rather strange position that would compel us to submit our case upon a brief and argument that had been prepared in the middle of the case. So, it seems to us, that under the circumstances we have the right to ask that this case be closed. It has been closed, and all that we are asking now is that it shall not be reopened and the whole matter gone over again.

Before we get through with this case, and right here in this initial step, we desire to be heard upon the whole question of procedure. We are willing to be heard now, or to be heard after the Commission has passed upon this objection. We would prefer to have the hearing at this time if the Commission would allow us to be heard, because we would try to elucidate what we believe to be the proper practice; and I am certain that with the possible differences of opinion entertained by members of the Commission, it might be well to go right to the heart of that question, not only for the determination of this case, but also for cases that may arise in the future. I will leave it for the Commission to say whether we shall be permitted at this time to go into that subject, leaving this question in abeyance until we have closed our argument upon that feature.

The Chairman: The hearings held by the Commission in connection with the investigations into the costs of production are a source of information to the Commission relative to costs in this country and abroad. This hearing for final argument and for presentation of briefs is offered in accordance with the provisions of the law for the purpose of presenting information and seeking evidence and testimony in regard to costs of production of sodium nitrite in this country and abroad. If counsel and parties in interest have evidence to present as to costs of production in the United States or costs of production in Norway, every reasonable opportunity to present that evidence will be afforded.

In connection with Senator McCumber's request, which seems, in a way, to broaden the scope of the hearing, if it means a discussion of methods of procedure in general, I think the Commission would decline to enter into that phase of the question at this time. If it is a question of procedure bearing particularly upon the questions now before the Commission and open for discussion at this hearing, the Commission will be pleased to hear any pertinent suggestions in regard to procedure.

Mr. McCumber: Mr. Chairman, one of the objections that we have to any further testimony being received by the Commission at this time relates to the question of the Commission submitting its own findings, or such evidence as is produced in an independent investigation by the

Commission, for the cross examination or for the discussion or use of either party in interest; and, as the whole argument would be directed toward that one question, or almost entirely to that one question, which is really the deciding question in this case, I would say that my argument, while it might be broad enough, and necessarily would be sufficiently broad in scope to cover the field of practice, will aim directly to that particular phase of the question as to whether either party to the proceeding has the right to request or demand that the Commission shall submit its records of an independent investigation to the parties.

With that brief statement of what I purpose to try to elucidate, I will leave it with the Commission to determine whether I shall be heard.

The Chairman: The Commission will hear you further on that point.

Commissioner Culbertson: Judge De Vries, may I ask a question to clarify the situation? Do you expect to offer any testimony this morning through witnesses?

Mr. De Vries: No. All the information which I shall offer the Commission will be printed as a part of the brief.

Commissioner Costigan: It will not be sworn testimony?

Mr. De Vries: No, it will not.

Commissioner Costigan: It will be, however, new material.

Mr. De Vries: It will be in the form of telegrams, cablegrams and answers to them, and copies of official documents which are open to the Commission for investigation. That is all it was possible to secure in the few days we had to secure it.

Commissioner Culbertson: Do you submit them as evidence or as objections to the Commission which they are to follow up?

Mr. De Vries: Information in the case. They contain statements of facts which we submit as true.

Commissioner Glassie: Do you wish them to be given evidential value?

Mr. De Vries: As information, yes.

Commissioner Glassie: You say they are supposed to have a probative force.

Mr. De Vries: Yes, they do.

Commissioner Glassie: In determining the action of the Commission?

Mr. De Vries: Prima facie so, Mr. Glassie; and if the Commission doubts them, of course the Commission can investigate them. I find a rule of the Commission to the effect that papers and documents submitted before this Commission as evidence may be investigated by the Commission, and probably will, as to the probative force. We find, in the other report that you have submitted to us in this case, as a statement of facts found, quotations from scientific journals and from newspapers and other sources of information which the Commission submits as evidence taken before it or information gathered in its investigation. Those things can be replied to by information of equal solemnity, which the Commission has a right to take into consideration, giving them such weight as they see fit, and if they doubt them, they can investigate the authenticity, which is pointed to in the documents themselves.

Commissioner Glassie: It is in the nature of new matter, however, and it is not merely argument on a closed record.

Mr. De Vries: They are both united in one, for the convenience of the Commission, Mr. Glassie.

Commissioner Burgess: Is your material in such shape that you could present it to the other side before Monday? I refer to your manuscript.

Mr. De Vries: It is a question of printing, Mr. Burgess.

Commissioner Burgess: I mean in manuscript form.

Mr. De Vries: No; most of it is in the hands of the printer now.

Commissioner Burgess: You have not any duplicate copies which could be handed to the other side?

Mr. De Vries: No, sir. I think Senator McCumber's request to examine these matters in ample time to reply is the right thing under the circumstances. That is the orderly procedure, that either party have ample time to consider what is submitted against it and to answer it, and ample and full time to reply. For that reason I made the point before, and I renew it now, that the few days that were allowed us, six or seven days, are not a reasonable time in which to gather information from Norway and from Seattle in any form of solemnity which should be submitted to a court, or for examination by us and segregation for presentation to this Commission. But we have

done our best, and we think we have something that the Commission would be very glad to see. For the convenience of the Commission and all parties we are printing every bit of it in sufficient numbers so that it may be examined by the Commission and by the other parties to this proceeding. The printing of it will be completed on Monday.

Mr. McCumber: Mr. Chairman, may I be heard upon this one feature of the case?

About one year ago the parties in interest knew of this proceeding. They have had a whole year in which to present anything they thought was pertinent to the question of cost of production of this article in Norway. As we understand the duty of the Commission, it is to carry out the intent and the purpose of the law and its policy. One of the policies of the law there was the protection of American industries. It makes little difference whether we agree with that policy or not, but that is declared to be the policy of the law, to protect the American industries that they may be maintained in this country.

It is hardly in line with protection that a languishing concern, and one which is finally compelled to temporarily close its doors, should be prejudiced by the practice of continuing cases, and opening and reopening cases for a whole year, until the patient dies. That is hardly in accordance with the purpose of the law itself, and it seems to me unfair to allow the matter to drag along.

Of course, it is to the interest of the importer that it should be dragged along. It is in the interest of the purchaser from that importer that it should be dragged as long as possible, and to the final end that the American manufacturer may cease to be a menace to his business in the United States.

If I understand the purpose of the law and the creation of the Commission, it is to prevent just that thing from being done, whether it is done by methods of delay or whether it be done by reason of the under-selling in the United States for any particular length of time.

The Chairman: Mr. McCumber, the request, as we understand it, is not to reopen the case, but for reasonable time to present evidence which they have gathered or are in the process of gathering, evidence that bears directly

upon the issue in this case, that is, the cost of production here and abroad. The point is, has the Commission given reasonable time for the preparation and presentation of that evidence? Request is now made, as we understand it, for a continuance of the hearing at least until Monday, in order that the evidence that has been prepared and the brief that has been prepared may be obtained from the printer and presented in due form to the Commission. Would you direct your remarks to that phase of the request, and then, anything that you have to say in regard to the procedure of the Commission in connection with this particular investigation, we will be glad to hear.

Mr. McCumber: Mr. Chairman, reasoning from analogy, I would suppose that when the judge of a court directs counsel for the respective parties to proceed with their argument, and they do proceed, and close that argument, after that argument has been made, if the court should then say "We will allow either party to produce further evidence," that would be a reopening of the case, and I use the words "reopening of the case" in that respect.

I think it is unfair to us, both from the standpoint of the long delay that has already been had in this case, and also from the standpoint of compelling us to go into the matter again, to retry any matter, on any evidence that the parties in interest have had a whole year to present. That is the injustice in the matter.

Of course, we must submit to any ruling that the Commission sees fit to make, but I think we have a right to call the attention of the Commission to the fact that, of course, if other evidence is produced, on Monday, if it is something that has taken a long time to have printed, it will take us some time to read it. It will take us another long time to refute it, if there is anything to refute it; and then if there is new matter brought out, of course we shall have to make a further argument. That seems to us to be very unjust in the matter. I appreciate that the Commission is trying to give every party every possible means of assisting the Commission in securing data on which it is to report to the President, but I think that it has gone further than it should go in attempting to reopen the case again after this long period of discussion.

Commissioner Costigan: Senator McCumber, what bearing on the argument would the suggestion in his brief that

this is not a judicial body have? In other words, in your opinion, should a non-judicial body investigate with greater latitude, or with more definite restrictions than those ordinarily imposed by the courts?

Mr. McCumber: I will admit that it should have greater latitude, and that its methods should not be analogous to those of a court, and for that reason I deny the right of any party under the law to call and cross-examine witness, to do anything, or to follow any code of procedure that they would follow before a judicial tribunal.

I insist that the law does not contemplate that kind of a hearing, and if that kind of a hearing is given, when you get thirty or forty or fifty or a hundred cases of this kind before the Commission, you have destroyed the Commission's ability to handle the cases at all, and no relief can be obtained.

I want to be heard further upon those questions of what should be the procedure in a case of this kind.

Commissioner Lewis: I am sure the Commission will hear you upon this subject, Senator, with the greatest of interest, if only because of your relation to the subject. It is apparent that you have been giving it some thought, and I think discussion would be helpful.

Mr. McCumber: I might say that there might be others that could present the matter more lucidly and carefully than I could myself; but I think that I have some suggestions that might be helpful. However, I desire to allow the Commission to determine that for themselves.

Commissioner Glassie: Senator, I understood the Chairman to rule that you might proceed with the discussion of procedure in its general application to this case, and I was rather expecting that you would do so. I thought we were all agreed as to that.

The Chairman: Opportunity was afforded to Senator McCumber, with, of course, the understanding that Judge De Vries has an opportunity to meet any suggestion that he makes here.

Mr. De Vries: Just at this juncture I want to make one suggestion, Mr. Chairman, in reply to some of the things Senator McCumber has said.

So far as the protection of the interests of American manufacturers is concerned, I do not think I have to say

in this presence my line of thought in that connection, but I want to say that the importing interests in this country have also a great interest, and they are entitled to equal consideration before this Commission with the American producing interests in determining the rates of duty.

My thought in that connection is not a political thought, but it is the thought that is based upon the provisions of this Act and that the rights which we are here seeking are founded in the statute and not in political views upon the subject of American producers and importers.

The statute, which it may be well to read at this juncture, provides that investigations to assist the President in ascertaining differences in costs of production under this Section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The Commission shall give reasonable public notice of its hearings, shall give reasonable opportunities to parties interested to be present, to produce evidence and to be heard.

The Commission is authorized to adopt rules. Of course, that provision is familiar to all of us here, but, let us apply it to the facts in this case.

It has been suggested that this case has been pending for one year. That is true, but the interested parties in opposition did not know what case was being prepared. It has taken the Government investigators, most capable men, one year to find the facts that are presented to us to be answered in eight days. The petitioner itself had to file three petitions before he finally settled down to the particular case, and if we are correctly informed of the case here, piece by piece, and the testimony taken in this record, the case he finally rests upon after a year's deliberation and consideration is a vastly different case from the case he presented a year ago.

In view of those facts, and the fact that we must go abroad and to the far side of this continent to gather our information, we respectfully suggest that the statute, which gives us the right to be present and to be heard, which the decisions hold means to be heard upon every particle of evidence produced in the case that is not a trade secret or practice, entitles us to more than eight or

ten days to examine and be heard upon the product of the thought of the best minds of the country for a year.

* * * * * * *

[Here followed legal argument by McCumber, Sullivan, and De Vries.]

The Chairman: If the observations on the procedure of the Commission are completed——

Mr. Sullivan: Mr. Chairman, may I make one statement before adjournment and the closing of the case?

With reference directly to this case, we contend that the findings of this Commission issued on the 15th of September were erroneously issued and erroneously published under the interpretation which we take of the law. That being so, we direct our objection to the introduction of any further testimony on account of this publication of the findings of the Commission, and we ask that the case be considered closed as of September 26, the date when the briefs were filed, or that it be closed as of today upon the filing of briefs and arguments without any further testimony.

The Chairman: The hearing, of course, cannot be regarded as closed as of September 26th because we set this date for the purpose of filing briefs or presenting evidence in connection with the summary of information in the possession of the Commission that was supplied to counsel on each side, and also for the purpose of presenting the final arguments. Counsel for the Norwegian Nitrogent Products Company has asked for an extension to Monday for the purpose of filing his brief. The Commission grants the request for an extension of time for the purpose of filing the brief until Monday and extends to the counsel on the other side the privilege, for a period of ten days, or to October 17th, of considering the brief and filing with the Commission an answer if it desires to do so.

Mr. De Vries: Do I understand I am not to include in that brief the documentary evidence which I have spoken of?

The Chairman: You are permitted to include in the brief the documentary evidence.

Mr. De Vries: Thank you.

Mr. McCumber: May we suggest that it is possible that we may not want that length of time, and we can only determine that after we have seen counsel's brief and after we have read over the testimony, and I would not wish the Commission to set a date which we might not call for, and I would ask the Commission not to fix that date until we have an opportunity—that is, a final date—to determine how much time will be necessary, until the Commission may be informed. Possibly after we have examined the testimony we can inform the Commission the number of days that will be required, and it may not require that length of time. We are very much interested in closing the case as soon as possible.

The Chairman: We extend to you the privilege to October 17th of filing your answer to the brief.

Mr. De Vries: What time on Monday do we have? The printers will not work on Sunday. If you make it 10 o'clock Tuesday morning it will be just the same. It will be served and filed before then and we will have Monday night to print it.

The Chairman: That will be agreeable.

Mr. De Vries: It will be simply the filing of the brief.

The Chairman: It will be 10 o'clock Tuesday morning. Have the counsel arguments to present in this case?

Mr. De Vries: We shall have none other than in the brief.

The Chairman: Has counsel for the American Nitrogen Products Company?

Mr. McCumber: We have one little additional argument which has been prepared by Mr. Sullivan covering questions which I did not cover exclusively in my argument or in the brief which I prepared. It is simply in typewritten form and is very short, and if there is no objection, we ask that it simply be taken by the reporter and inserted as a part of the record.

Mr. De Vries: There is no objection at all to Senator McCumber's argument on the construction of the Act at any time.

* * * * * * *

The Chairman: Are there any other persons present who desire to be heard or to present argument in this case?

(No response.)

The Chairman: If not, the hearings in connection with the investigation concerning the cost of production of sodium nitrite are closed.

(Thereupon, at 12:40 o'clock p. m., the hearings were closed.)

Exhibit 8.

Indorsed: U. S. Customs Court. Exhibit 8. No. 92852-G. Date: 11/24, 1930. S. C. H., Reporter.

Brief re Customs Duty Increase on the Chemical Sodium Nitrite, Submitted to the United States Tariff Commission by the American Nitrogen Products Company, Seattle, Washington, October 24, 1922.

SEATTLE, WASH., October 24, 1922.

United States Tariff Commission,
Washington, D. C.

GENTLEMEN:

Sodium Nitrite.

1. Due to foreign competition, mainly German, Swiss, and Norwegian, this Company's air nitrate plant located at La Grande, Washington, was closed April 1, 1921, and has remained closed ever since. This plant manufactures exclusively sodium nitrite and its very life is therefore dependent on this product and it alone. Any change in plant or processes would be prohibitively expensive. It must remain a sodium nitrite plant. This plant is the largest producer of sodium nitrite in this country. It is the only plant of its kind on the American Continent, employing what is known as the electric arc method of air nitrogen fixation. Because of this fact its existence and maintenance is of vast interest and importance to the United States Government which has time and again gone on record as favoring the investigation,

development, and fostering of the various nitrogen fixation methods in this country. As a case in point we mention the expenditure at Muscle Shoals of $105,000,000 by Congress in the building of air nitrate plants. Our plant was built in 1917 and involves an expenditure of $250,000 all of which is private capital. Only a depletion of the huge stocks of foreign nitrite imported into this country prior to the embargo taking effect, and a reasonable future sales price, can maintain this plant. The stocks are gradually being depleted but the destructive competition of the large foreign air nitrate works still exists in spite of the three (3) cent duty as proven in the next paragraph. These large foreign air nitrate works manufacture sodium nitrite as a by-product and can therefore dispose of it very cheaply. They are, of course, also enormously benefited by the disparity in foreign exchange. A reasonable sales price is between nine (9) and ten (10) cents per pound f. o. b. consumers works.

* * * (Confidential portions omitted.) * * * In the hope of better business to come, we are endeavoring to resume operations. However, we were informed later that the importers offered to go as low as seven and one-half (7½) cents per pound, all charges and duty paid, in order to secure the business. It is reasonable to suppose that even this price will be lowered in the future if such action becomes necessary to secure the trade. But even on the seven and one-half (7½) cents per pound delivered price basis the addition of an extra fifty (50) per cent of duty or one and one-half cents per pound will fix the price of foreign nitrite in this country at nine (9) cents per pound. If we are forced below this figure permanently it will not allow us a reasonable margin of profit as clearly proven in next paragraph. * * * (Confidential portions omitted.) * * *

3. Our costs are shown below. We invite particular attention to the fact that our far western location does not adversely affect our delivered costs because of special low commodity freight rates granted us as an encouragement to the industry. Any raw materials used are also obtained very cheaply. Overhead, salaries, and other charges are also kept at a minimum. For instance, the highest salary paid any official is only $500 per month. This is the president and general manager of the company. It is merely

nominal and proves our economies in endeavoring to establish the business. We, therefore, consider our costs fair, reasonable, and competitive, in so far as domestic manufacture is concerned. It is the best that can be done with a relatively small plant and until the industry is developed and established on a larger scale. This we are endeavoring to do and when such expansion has taken place and costs have been reduced, this company shall be only too glad to give the consumers the benefit of same and the President may then reduce the duty. In the meantime, however, we need the added protection very badly indeed.

* * * (Confidential portions omitted.) * * *

4. The profit assumed above of 1.2¢ per pound equals $24.00 per ton which, on 100 tons monthly production, is $2400 or $28,800 per year. Our outstanding capital stock, fully paid up, is $1,229,500. The above profit is, therefore, merely nominal and would be entirely inadequate for a dividend. It is in the hope of expansion and fair profits to come in the future that this corporation is heroically continuing its efforts to put the business on its feet in this country. In the meantime, however, we must at least exist. It is certain that a total duty of at least four and one-half (4½) cents per pound is necessary to insure this. Only two dividends on the capital stock of this company have been paid and then only on the preferred stock. This was during the war years, 1917 and 1918. The net earnings since then have been insufficient to take care of dividends.

5. We call your attention to the fact that market quotations as given on imported sodium nitrite as printed in the chemical journals always considerably exceed the *inside* prices quoted on bona fide contract competitive basis. It is only through a competitive case such as cited in paragraph 2 of this letter that the *real* price is disclosed. Such inside price quotations are seldom transmitted in writing. They are generally handled verbally.

6. Attached hereto please find photograph of the plant.

7. In view of all the above we respectfully request an

early report and recommendation to the President that the duty on sodium nitrite be increased fifty (50) per cent.

Very truly yours,

AMERICAN NITROGEN PRODUCTS COMPANY,

(Signed) By C. F. GRAFF, *Pres.,*
President and General Manager.

LAK.
Incl. 1.

Exhibit 9.

United States Tariff Commission, 8th and E Streets N. W., Washington.

Thomas O. Marvin, Chairman; William S. Culbertson, Vice-Chairman; David J. Lewis, Edward P. Costigan, William Burgess, Henry H. Glassie. John F. Bethune, Secretary.

Address reply to United States Tariff Commission.
File No. —.

Summary of Information in the Matter of Sodium Nitrite, the Subject of Public Hearing, September 10, 1923, with Letter of Transmittal to Appellant September 15, 1923.

September 15, 1923.

De Vries and Doherty,
Counsellors-at-Law,
Southern Building,
Washington, D. C.

DEAR SIRS:

Herewith please find inclosed summary of information compiled by the Tariff Commission in connection with the pending investigation of costs of production of sodium nitrite, for the purposes of Section 315, Title III, of the Tariff Act of 1922.

Very truly yours,

JOHN F. BETHUNE,
Secretary.

Inclosure.

Indorsed: U. S. Customs Court. Exhibit 9. Prot. No. 92852-G. Date: 11/24, 1930. S. C. H., Reporter.

United States Tariff Commission.

A Summary of Information in the Matter of Sodium Nitrite, the Subject of a Public Hearing, September 10, 1923.

This Summary is information obtained from the public hearing, from publications, correspondence on file in this office, questionnaires sent to manufacturers, and inspection of books and factories of manufacturers by representatives of the Commission, and interviews with persons having personal knowledge of this industry.

All information in regard to costs of manufacture of individual firms and other information in the nature of trade secrets or processes has been eliminated from this Summary, as required by section 708 of the Revenue Act of 1916, the pertinent provisions of which are as follows:

Sec. 708. "It shall be unlawful for any member of the United States Tariff Commission or for any employee, agent, or clerk of such commission, or any other officer or employee of the United States, to divulge or make known in any manner whatever not provided for by law, to any person, the trade secrets, or processes of any person, firm, copartnership, corporation or association, embraced in any examination or investigation conducted by said commission or by order of said commission; or by order of any member thereof. * * *"

An opportunity will be given for argument on the record on September 26, 1923, at 10:00 a. m., in the office of the United States Tariff Commission.

An application from the American Nitrogen Products Company requests an increase in duty from 3 cents per pound to 4½ cents per pound.

This application reads as follows:

(Copy.)

SEATTLE, WASH., October 24, 1922.

United States Tariff Commission,
Washington, D. C.

GENTLEMEN:

Sodium Nitrite.

1. Due to foreign competition, mainly German, Swiss, and Norwegian, this Company's air nitrate plant located at La Grande, Washington, was closed April 1, 1921, and has remained closed ever since. This plant manufactures exclusively sodium nitrite and its very life is therefore dependent on this product and it alone. Any change in plant or processes would be prohibitively expensive. It must remain a sodium nitrite plant. This plant is the largest producer of sodium nitrite in this country. It is the only plant of its kind on the American Continent, employing what is known as the electric arc method of air nitrogen fixation. Because of this fact its existence and maintenance is of vast interest and importance to the United States Government which has time and again gone on record as favoring the investigation, development, and fostering of the various nitrogen fixation methods in this country. As a case in point we mention the expenditure at Muscle Shoals of $105,000,000 by Congress in the building of air nitrate plants. Our plant was built in 1917 and involves an expenditure of $250,000, all of which is private capital. Only a depletion of the huge stocks of foreign nitrite imported into this country prior to the embargo taking effect, and a reasonable future sales price, can maintain this plant. The stocks are gradually being depleted but the destructive competition of the large foreign air nitrate works still exists in spite of the three (3) cent duty as proven in the next paragraph. These large foreign air nitrate works manufacture sodium nitrite as a by-product and can therefore dispose of it very cheaply. They are, of course, also enormously benefited by the disparity in foreign exchange. A reasonable sales price is between nine (9) and ten (10) cents per pound f. o. b. consumer's works.

* * * (Confidential portions omitted.) * * * In the hope of better business to come, we are endeavoring to resume operations. However, we were informed later that the importers offered to go as low as seven and one-half (7½) cents per pound, all charges and duty paid, in order to secure the business. It is reasonable to suppose that even this price will be lowered in the future if such action becomes necessary to secure the trade. But even on the seven and one-half (7½) cents per pound delivered price basis the addition of an extra fifty (50) per cent of duty or one and one-half cents per pound will fix the price of foreign nitrite in this country at nine (9) cents per pound. If we are forced below this figure permanently it will not allow us a reasonable margin of profit as clearly proven in next paragraph. * * * (Confidential portions omitted) * * *.

3. Our costs are shown below. We invite particular attention to the fact that our far western location does not adversely effect our delivered costs because of special low commodity freight rates granted us as an encouragement to the industry. Any raw materials used are also obtained very cheaply. Overhead, salaries, and other charges are also kept at a minimum. For instance, the highest salary paid any official is only $500 per month. This is the president and general manager of the company. It is merely nominal and proves our economics in endeavoring to establish the business. We, therefore, consider our costs fair, reasonable, and competitive, in so far as domestic manufacture is concerned. It is the best that can be done with a relatively small plant and until the industry is developed and established on a larger scale. This we are endeavoring to do and when such expansion has taken place and costs have been reduced, this company shall be only too glad to give the consumers the benefit of same and the President may then reduce the duty. In the meantime, however, we need the added protection very badly indeed.

* * * (Confidential portions omitted.) * * *

4. The profit assumed above of 1.2¢ per pound equals $24.00 per ton which, on 100 tons monthly production, is $2400 or $28,800 per year. Our outstanding capital stock,

fully paid up, is $1,229,500. The above profit is, therefore, merely nominal and would be entirely inadequate for a dividend. It is in the hope of expansion and fair profits to come in the future that this corporation is heroically continuing its efforts to put the business on its feet in this country. In the meantime, however, we must at least exist. It is certain that a total duty of at least four and one-half (4½) cents per pound is necessary to insure this. Only two dividends on the capital stock of this company have been paid and then only on the preferred stock. This was during the war years, 1917 and 1918. The net earnings since then have been insufficient to take care of dividends.

5. We call your attention to the fact that market quotations as given on imported sodium nitrite as printed in the chemical journals always considerably exceed the *inside* prices quoted on bona fide contract competitive basis. It is only through a competitive case such as cited in paragraph 2 of this letter that the *real* price is disclosed. Such inside price quotations are seldom transmitted in writing. They are generally handled verbally.

6. Attached hereto please find photograph of the plant.

7. In view of all the above we respectfully request an early report and recommendation to the President that the duty on sodium nitrite be increased fifty (50) per cent.

Very truly yours,

AMERICAN NITROGEN PRODUCTS COMPANY,

(Signed) By C. F. GRAFF, *Pres.*,
President and General Manager.

LAK.
Incl. 1.

Summary of Information on Sodium Nitrite.

United States Tariff Commission.

Rates of Duty.

Act of 1922—3 cents per pound.
Act of 1921—Embargo (May 27, 1921, to Sept. 21, 1922).
Act of 1913—½ cent per pound.
Act of 1909—2 cents per pound.

Uses of the Article.

Sodium Nitrite is used chiefly in the manufacture of "Azo" dyes. This class of dyes represents over 40 per cent of the total domestic output. It also has minor laboratory and pharmaceutical uses.

Raw Materials and Sources Thereof.

There are three processes in use for the manufacture of sodium nitrite, viz:

1) *Arc Process.*—By this process nitrogen of the air is converted by an electric arc into oxides of nitrogen which are absorbed in soda ash to produce sodium nitrite. The commercial production of sodium nitrite by this process requires that power be available at a comparatively low rate.

2) *Ammonia-Oxidation Process.*—Ammonia is converted to oxides of nitrogen by passing it through a heated platinum gauze. The oxides of nitrogen are converted into sodium nitrite as given above.

3) *Sodium Nitrate Process.*—By this method sodium nitrate (Chilean nitrate) is reduced by means of lead to sodium nitrite with the simultaneous formation of litharge.

Soda ash is an important material for the manufacture of sodium nitrite by both the arc process and the ammonia-oxidation process. The domestic price on September 10, 1923, for contracts was $1.45 per 100 pounds in bags at makers' works.

Domestic Production.

Significant History.—Prior to the war sodium nitrite was not made to any extent in this country. What was made was produced by the sodium nitrate process. During the war the development of the dye industry caused a heavy demand and considerable sodium nitrite was produced by the arc process and by the ammonia-oxidation method.

Manufacturers and Geographical Distribution.—The two principal producers of sodium nitrite are the Semet-Solvay

Co. of Syracuse, N. Y., which firm uses the ammonia-oxidation process, and the American Nitrogen Products Co., Seattle, Washington, operating the arc process. The only other producer, the Harshaw, Fuller and Goodwin Co., of Cleveland, Ohio, makes a smaller quantity of sodium nitrite by the sodium nitrate process.

Production and Consumption.—The estimated normal consumption of sodium nitrite in the United States is about 6,000,000 pounds per year. From evidence submitted, domestic producers have plant capacities equal to about 87% of these requirements.

TABLE 1.—*Domestic Production of Sodium Nitrite.*[1]

Year.	Pounds.	Value.	Unit value, cents per pound.
1917	1,722,000	$480,145	27.85
1918	3,402,000	609,779	17.90
1919	2,364,000	265,121	11.21
1920	2,394,000	405,184	16.92

[1] From Mineral Resources of the United States Geological Survey.

Imports.

Norway and Germany supply most of the sodium nitrite imported. Imports from 1914 to 1921 have varied from 1¾ to 3½ million pounds with the exception of the year 1920, when 11,690,000 pounds were brought in. This very large importation was probably about 25% in excess of the domestic requirements of the abnormally large output of dyes in that year. On an average about 50% of the demand for sodium nitrite in the United States has been supplied by imports. During the 4th quarter of 1922, 1,460,528 pounds of sodium nitrite were imported at an average declared value of 4 cents per pound. During the first 6 months of 1923, 3,647,125 pounds of sodium nitrite were imported at an average declared value of 4.4 cents per pound.

TABLE 2.—*Sodium Nitrite Imported Into the United States for Consumption, 1908–1923.*

Fiscal year.	Quantity pounds.	Value.	Unit value, per pound.	Computed ad valorem rate per cent.
1908	199,857	$10,015	$0.050	49.91
1909	152,393	7,258	.048	52.49
1910 [1]	24	4	.167	.....
1910 [2]	1,132,754	52,233	.046	43.37
1911	477,707	21,205	.044	45.06
1912	974,667	47,399	.049	41.13
1913	1,269,544	57,595	.045	44.09
1914 [3]	153,143	7,447	.049	41.13
1914 [4]	1,691,236	69,366	.041	12.19
1915	1,696,567	74,267	.043	11.42
1916	2,593,330	170,160	.065	7.62
1917	3,675,179	261,655	.071	7.02
1918	2,755,033	248,294	.090	6.09
Calendar year:				
1919	2,550,689	246,729	.0967	5.17
1920	11,690,142	1,378,992	.1180	4.24
1921	3,174,642	238,083	.0750	6.67
1922 [5]	1,000	209	.2090	2.39
1922 [6]	1,460,528	58,093	.0398	75.42
1923 (6 months) [7]	3,647,125	160,238	.0439	68.2

[1] Act of 1897, July 1, 1909, to August 5, 1909.
[2] Act of 1909, August 6, 1909, to June 30, 1910.
[3] Act of 1909, July 1, 1913, to October 3, 1914.
[4] Act of 1913, October 4, 1913, to June 30, 1914.
[5] Act of 1913, January 1, 1922, to September 21, 1922.
[6] Act of 1922, September 22, 1922, to December 31, 1922.
[7] General Imports.

The exports of sodium nitrite from Norway to the United States during March, April, and May, 1923, were 1,073,000 pounds; the average invoice value was 4.84 cents per pound c. i. f. New York. Included in this price are the following charges:

	Per 100 pounds.
Packing	$0.204
Inland freight	.026
Ocean freight and insurance	.273
Total	$0.503

Deducting these charges, the average price received at the factory in Norway was 4.34 cents per pound.

Exports.

Sodium nitrite has not been exported from the United States in appreciable quantities.

Foreign Production.

The Norsk Hydro-Elektrisk Kvaelstofaktieselskap of Norway, and the Badische-Anilin and Soda Fabrik of Germany, are the largest foreign producers of sodium nitrite. The Norsk-Hydro has an annual capacity for sodium nitrite of some 24,000,000 pounds. This compay uses the arc process. The output of the Badische company is large but figures are not avaliable. This company fixes nitrogen by the Haber ammonia process. The ammonia is converted chiefly into nitric acid and nitrates; sodium nitrite is also obtained in the process as a minor product.

At the Norsk Hydro plant sodium nitrite together with sodium nitrate are manufactured in connection with the production of calcium nitrate, which is used as a fertilizer. The relative production of the three products is shown in the following table which gives the daily capacity of the principal plant of Norsk Hydro.

	Daily capacity.	
	Metric tons.	Short tons.
Calcium Nitrate	400	441
Sodium Nitrate	40	44
Sodium Nitrite	30	33

The production of sodium nitrite in Germany is also a minor product compared with other products made in the same plant.

The situation in the United States is quite different. Sodium nitrite is the only product made by the American Nitrogen Products Company, and the production of this commodity by the Semet-Solvay Company represents an independent unit of their plant. This latter company and associated companies, however, make many other important chemicals, including the raw materials necessary for the manufacture of sodium nitrite by the ammonia oxidation process, namely, ammonia and soda ash.

Production Costs.

Domestic costs of production for sodium nitrite were secured from The American Nitrogen Products Co., and the Semet-Solvay Co. These costs are not published by the

Commission, as they are claimed by domestic manufacturers to be "trade secrets" within the meaning of section 708 of the Revenue Act of 1916.

Both the Norsk Hydro of Norway and the Badische Anilin of Germany refused to give investigators of the Tariff Commission access to their cost records relating to sodium nitrite.

Estimate of Norwegian Costs.—In the case of Norway, information was obtained from other sources as to power costs, prices of soda ash, wage rates and other factors relating to production costs. From such information the Tariff Commission has prepared the following tentative estimate of producing sodium nitrite in Norway:

TABLE 3.—*Estimate of Sodium Nitrite Costs in Norway.*

	Kroners per short ton.	Converted cost per 100 pounds.	
		Current exchange.[1]	Par exchange.[2]
Power—2 H. P. years, at 20 kroners...	40.0	$0.333	$0.50
Soda Ash—1 ton at 130 kroners	130.0	1.083	1.625
Labor (estimated at 6% of total labor of plant).....	26.2	.218	.327
Subtotal.....	196.2	1.634	2.452
Total Cost (estimated on basis that power, soda ash and labor are 75% of total cost).....	262.0	2.183	3.275

[1] Converted at 6 kroners to the dollar.
[2] Converted at 4 kroners to the dollar.

Power concessions granted by the Norwegian Government under the Water Power Concession Act show that power has been contracted for as follows:

1). Porsgrund Elektrometallurgiske Aktieselskap at Porsgrund have contracted for 6,000 H. P. at 32 kroners per H. P. year and an additional 4,000 H. P. at 30 kroners.

2). Electro Furnace Products Co., Ltd., at Sauda have contracted for 40,000 H. P. at 32 kroners per H. P. year and have an option on an additional 40,000 H. P. at the same rate.

An article published in Teknish Ukeblad April 23, 1915, page 229 shows that the larger part of the power in Norway has been developed between 120 and 180 kroners per horse power. 300,000 H. P. at Rjukan at a cost of 180 kroners

would represent an investment of 54,000,000 kroners. The total investment at Rjukan, including power developments and chemical plants, as published in the 1922 financial statement of the Norsk Hydro, is about 66,000,000 kroners.

A sales price for power of 18 kroners per H. P. year would yield a 10 per cent return on the original cost of development. In the estimate given above, however, 20 kroners per H. P. year has been taken as an average price for power.

Information was obtained that the cost of soda ash in Norway was from 130 to 140 kroners *per metric ton.* The cost of soda ash has been taken as 130 kroners *per short ton.* Slightly less than one ton of soda ash is required for each ton of sodium nitrite produced.

The basic wage rate in the electro chemical industry is from 1.50 kroner to 1.80 kroner per hour, which rate applies in the plants of the Norsk Hydro. Additions to this rate such as vacation period (2 weeks) with pay make an average wage rate of about 2.0 kroners per hour. From this information and the number of employes the cost of labor has been estimated. Labor is a minor item of costs as the process used in Norway is continuous and automatic to a large extent.

Prices.

Prices in Germany.—Prices at which sodium nitrite was sold in Germany for home consumption were obtained from the Badische Anilin and Soda Fabrik. These prices naturally represent a profit, as this firm is the only producer and has no competition in the German market. The following prices are for sodium nitrite at makers' works unpacked:

Paper marks per Kilo.		Dollars converted at current exchange.
Jan. 1, 1922	12.0	$0.029 per pound.
Apr. 1, 1922	18.5	.028 " "
July 1, 1922	23.0	.026 " "
Oct. 1, 1922	82.0	.021 " "
July 1, 1923	0.40 Gold Marks.	.0433 " "

Tables 4 and 5 give domestic and foreign prices of sodium nitrite.

From a prewar price of about 5 to 6 cents per pound, the price rose steadily to 44 cents in October, 1917. From then

on it fell to 32 cents in October, 1918, and to 11 cents in October, 1919. It is *significant* that in 1918 American production attained its maximum. The 1920 minimum price was 13 cents, maximum 30 cents; 1921 showed 6 to 10 cents; 1922, 6 cents in January and 10 cents in October. During 1923 the price has dropped from 10 in January to 7½ in September. Foreign nitrite was quoted at 7½ cents in September.

TABLE 4.—*Spot Prices of Sodium Nitrite, New York Market*, 1915–1921.

(From Oil, Paint, & Drug Reporter.)

	1915	1916	1917	1918	1919	1920	1921
			Cents per pound.				
January	.....	18–21	18–21	40–43	19–20	13–14	6½– 7
April	7¼– 7½	18–21	18–22	36–37	14–15	24–30	6 – 7
July	18 –21	18–21	32–38	32–33	11–12	15–15½	7¼–10
October	18 –21	18–21	42–44	32–33	11–12	13–13½	6¾–10

TABLE 5.—*Prices of Sodium Nitrite, New York, Manchester, and Paris Markets, 1922 and 1923.*

(Per pound.)

	1922			
	New York.		Manchester (a).	Paris (b).
	Domestic.	Imported.		
January	$0.06 –.07	.....	$0.0620	$0.1271
February	.07 –.07½	.....	.0612	.1322
March	.08 –.08½	.....	.0614	.1042
April	.08 –.10	.....	.0586	.1020
May	.08½–.10	.....	.0594	.0939
June	.08½–.10	.....	.0597	.0926
July	.08½–.09½	.....	.0612	.0855
August	.09 –.09½	$0.07½–.08	.0614	.0832
September	.09 –.09½	.07¾–.08	.0578	.0732
October	.09½–.10	.09½–.10	.0548	.0691
November	.10	.08¼–.08½	.0537	.0717
December	.10	.08 –.08½	.0544	.0705
	1923			
January	$0.10	$0.08 –.08½	$0.0560	$0.0622
February	.10	.08½–.08¾	.0562	.0497
March	.10 –.10½	.08¼–.09	.0588	.0510
April	.10 –.10½	.08¼–.09	.0563	.0558
May	.10 –.10½	.08 –.08¼	.0559	.0565
June	.08¼–.08½	.08 –.08¼	.0557	.0543
July	.07¼–.07½	.07¾–.08	.0551	.0496
August	.07¼–.07½	.07½–.08	.....	.....

(a) From Chemical Trade Journal, London.
(b) From LaRevue des Produits Chimiques, Paris.

Competitive Situation.

Power Costs and Efficiency.—Information obtained by the Commission's investigators tends to show that the cost of power in Norway is considerably less than the price which the American Nitrogen Products Company pays for power.

In regard to power consumed per unit of nitrogen fixed, information obtained from the American firm when compared with estimates of power consumption in the Norwegian plant tends to show that the American firm produces less nitrogen per unit of power than is produced in Norway.

Capital Invested.—Information obtained as to capital investment when compared with capacities tends to show that the investment per unit of nitrogen fixed in the case of the American producer for the sodium nitrite plant alone is considerably greater than the unit investment of the Norwegian producer for both sodium nitrite plant and power plant.

Transportation.—The principal market for sodium nitrite is along the Atlantic Coast; especially the district adjacent to New York City. The freight rate to this market from the plant of the American Nitrogen Products Company is $0.85 per 100 pounds and from the plant of the Semet-Solvay Company $0.34 per 100 pounds. The combined inland and ocean freight plus insurance from the plants of the Norsk-Hydro Company to New York is $0.30 per 100 pounds.

Freight charges on soda ash, the principal raw material, to the plant of the American Nitrogen Products Company at La Grande, Washington, are $0.84 and $1.35 per 100 pounds from the California and Detroit markets respectively. In the case of Norsk Hydro in Norway soda ash must be imported, principally from England.

Substitutes.—Sodium nitrite is indispensable in the manufacture of "Azo" dyes. No substitutes have been found.

Price vs. Quality.—The quality of the nitrite produced in various countries and by different processes is equal, so that from a quality standpoint there should be no price differences.

Exhibit 10.

United States Tariff Commission, 8th and E Streets N. W., Washington.

Thomas O. Marvin, Chairman; William S. Culbertson, Vice-Chairman; David J. Lewis, Edward P. Costigan, William Burgess, Henry H. Glassie. John F. Bethune, Secretary.

Address reply to United States Tariff Commission.
File No. —.

September 24, 1923.

Messrs. De Vries & Doherty,
Southern Building,
Washington, D. C.

GENTLEMEN:

Receipt is acknowledged of your communication of September 11, requesting permission to examine all data obtained by the Commission in its investigation respecting Sodium Nitrite.

Without going into the details with respect to the law or policy in general of revealing confidential information, the Commission calls attention to the fact that it has hitherto obtained its cost data under pledges of confidence, and it therefore cannot violate this pledge of its own motion.

Furthermore, the opposition to this application is not in a favorable position to demand cost data from the applicant because the Norwegian companies which control the Norwegian Nitrogen Products Company of New York, according to our information, have refused to give, even confidentially, cost of production data in Norway for Sodium Nitrite when requested to do so by agents of the Commission.

The Commission is informed that the American Nitrogen Products Company, the applicant in this case, agrees to disclose its cost of production data if the opposition, the Norwegian Nitrogen Products Company, will furnish cost data for the Norwegian product. So far as the Commission is informed up to the present time this offer has not been accepted.

Therefore it is deemed impracticable to grant your request that "every particle of evidence gathered by the Commission or its representatives" be disclosed to all interested parties.

Very truly yours,

THOMAS O. MARVIN,
Chairman.

Indorsed: U. S. Customs Court. Exhibit 10. Prot. No. 92852-G. Date: 11/24, 1930. S. C. H., Reporter.

Exhibit 11.

De Vries & Doherty, Counsellors-at-Law, Southern Building, Washington, D. C.

Telephone: Main 2688.

Marion De Vries, Thomas J. Doherty, George Roscoe Davis, George F. Lamb; George F. De Venny.

New York Office: 120 Broadway.

Indorsed: U. S. Customs Court. Exhibit 11. Prot. No. 92852-G, &c. Date: 11/24, 1930. S. C. H., Reporter.

September 11, 1923.

To the Honorable United States Tariff Commission,
Washington, D. C.

GENTLEMEN:

In support of the motion made by the undersigned at the hearing of the application of the American Nitrite Products Company for an increase of duty upon Sodium Nitrite before your Commission, September 10, 1923, that I be supplied with a complete copy of the petition submitted in behalf of the petitioner herein, in order that we might be "heard" thereupon, I beg to renew that request and that we be supplied all facts submitted to the Commission herein and to submit the following:

The law controlling the proceedings of the Tariff Commission in this particular is a part of Paragraph (c) Section 315 of the Tariff Act of 1922, reading:

"Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The Commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The Commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary."

Section 318, Subdivision (e) reading:

"The United States Tariff Commission is authorized to adopt an official seal, which shall be judicially noticed."

and Subdivision (f) of Section 318, which reads:

"Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. And in case of disobedience to a subpœna the commission may invoke the aid of any district or territorial court of the United States or the Supreme Court of the District of Columbia in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which such inquiry is carried on may in case of contumacy or refusal to obey a subpœna issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

It is obvious therefrom that the investigations by the Tariff Commission are judicial in nature; that the result of those investigations is "evidence", and that "parties interested" are entitled "to be present", "to be heard", as well as "to produce evidence".

Every statute should be read in the light of the public facts which lead to its enactment. Tariff investigations for the purpose of fixing duties previously had been conducted by the Finance Committee of the Senate and the Ways and Means Committee of the House. Witnesses appearing before these bodies were not sworn. The evidence collected by these committees, upon which duties were fixed, was unverified and in the form of letters received by mail, statements submitted by unsworn witnesses appearing before the committees, statements made to members of the committees and members of Congress, and by members of Congress, without sanctity of oath and without opportunity of interested parties in opposition thereto being heard. The experiences of all time have demonstrated that investigations of this character did not and could not elucidate the truth. The result was that rates of duty were fixed upon insufficient, incomplete and false statements. All men know that statements made by interested parties in matters wherein their financial interests are at stake can not be relied upon save when made under the sanctity of oath, with opportunity of cross-examination and elucidation. It was in this view that Section 315 was enacted. It was in this view particularly that the first above quoted paragraph was inserted as a part thereof. This paragraph, as it integrally shows, was calculated to require that the evidence upon which the Tariff Commission acted should be verified and taken after due notice to all interested parties who were entitled to be present, to produce evidence, and to be heard upon all the evidence produced and not upon a part of such evidence.

Owing to the broad scope of these investigations by the Tariff Commission they were empowered by the law to "Adopt such reasonable procedure, rules, and regulations as it may deem necessary." The broad interpretation of that sentence which is justified would empower the Tariff Commission to do all things necessary which would effect the results secured interested parties by the preceding provision.

The wisdom of this requirement was well demonstrated in the hearing of September the 10th. The parties appearing in opposition had been supplied but a part, and a very

minor part, of the petition and none of the evidence which had been submitted to the United States Tariff Commission in the pending case. The only relevant statement which was submitted to them upon the cost of production in the United States as a basis for their investigations and opposition was the statement in the petitioner's petition that "Our outstanding capital stock, *fully paid up* is $1,229,500. The above profit is therefore merely nominal and would be entirely inadequate for a dividend. It is in the hope of expansion, *and therefore profits to come in the future*, that this corporation is heroically continuing its efforts to put the business upon its feet in this country." Wherefore, of course, the opposition worked back from this statement to prove its falsity. The opposition was laboring entirely in the dark as to further and more complete statements made by the petitioner to the United States Tariff Commission. As a matter of fact, a representative of the Commission had gone to Seattle and procured an entirely different statement from the petitioner, and a representative of the Commission had gone abroad and secured statements as to cost of production of nitrite abroad. The opposition knew nothing of these statements. It was not furnished with any of the data thus produced before and upon the files of the Commission. They appeared totally in the dark as to the real case or actual facts which had been presented to the Commission by the petitioner. Wherefore, the presentation of the case of the opposition in the light of what it had been officially informed by the Commission was the case made by the petitioner and which it would have to meet, whereas in truth and fact the files of the Commission presented an entirely different case.

Now it is respectfully submitted that no such proceeding was contemplated by Congress, when it provided in the law that in the proceedings of the Tariff Commission interested parties could be present and heard. To be heard upon what? Upon a different case than that which had been presented by the petitioner? Upon but a fragmentary part of that which had been presented by the petitioner and gathered by the Tariff Commission? What do the words in the statute "to be heard" mean? Do they mean that interested parties are to appear before the

Tariff Commission and when they seek to be heard upon the case as submitted are told that that which they have appeared there to be heard upon has been submitted to the Tariff Commission without the sanctity of oath, without their being present, without being verified, and without any privilege of interested parties to be present when submitted or to examine the same. It is respectfully submitted that no such proceeding by the Tariff Commission can ever be justly sustained under the law controlling their investigations. Is testimony taken by a representative of the Commission in the private office of the petitioner in Seattle, without the sanctity of oath, without interested parties being present, such an investigation as is contemplated by the law which provides that such investigations must be upon due notice to interested parties at a time and place when they can be present and heard? Is it true that this requirement of the law permits of investigations abroad of cost of materials, and costs of labor and costs of power which are not given under oath, which are given out of the presence of interested parties, which are given without an opportunity to be heard to be used by the Commission without any opportunity at any time for the opposition to be present or to know of the same and to be heard thereupon?

Now, it is not here contended that the Tariff Commission must be curtailed in its investigations and hearings to such before the Board in open session, but it is insisted that every particle of evidence gathered by the Commission or its representatives should not be accepted by that Commission for its final action until the interested parties shall have an opportunity to be present at its offering or to examine the same and be heard thereupon and to offer evidence in contradiction thereof before judgment of the Commission is rendered thereupon.

That is the very thing which caused public sentiment in this country, and for which there is an overwhelming sentiment in this country, to transfer the making of our tariff rates from Congress into a judicial commission. One of the principal reasons moving this change of the law was that testimony given and accepted in the making of our tariff rates should be verified testimony submitted in the presence of all interested parties who should have a right

to be heard thereupon, and give evidence in contradiction thereof.

So, it is respectfully submitted that until this opportunity as to all evidence submitted, which is not "trade secrets", is afforded interested parties no valid findings by the Commission can be had.

As to what is a "trade secret", it is particularly appropriate to refer to the case in re Bolster, 110 Pacific Reporter, 547. The case arose in Seattle and was decided by the Supreme Court of the State of Washington. The syllabus truly interprets the decision. It states:

"The term 'trade secret' as usually understood means a secret formula or process, not patented, known only to certain individuals using it in compounding some article of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on.

"The president of a corporation when required to appear and testify as a witness may not refuse to produce the record books of the corporation in response to a subpœna duces tecum because an examination of the books would infringe a right of privacy."

Now, it must be perfectly plain to all that costs of constructing a plant, that costs for the purchase of water power, that costs paid for a patent right, are not such trade secrets as are contemplated by the law and which are the only things in which a witness is protected as confidential in his business in a judicial investigation. If these things were confidential there never could be any investigation by this commission or by a court into "Cost of production". If this be true, inordinate profits could not be inquired into and profiteering would be protected by the law. It is respectfully submitted that any American producer or manufacturer who makes claim that Congress has erred in fixing a rate of duty as too low or when any importer claims that a rate of duty fixed is too high, they must come into court with clean hands, so to speak, with an open record, open not only to the commission but to cross-examination by those who in the business know the business, for it is the intent of the law that any inequality which he suffers will be mended by the commis-

sion and therefore an exposition of his disadvantages made known to the opposition will be cured by the commission.

It is respectfully submitted that until the proceedings are of this character by the Commission that the public will have no confidence in its findings. It has already been urged against this method that investigators who may be imposed upon are entirely probable, and that until the proceedings of the commission are fully and completely opened up to the public eye for examination by interested parties and until they are heard thereupon, as contemplated by the law, the public will have no confidence in but will be suspicious of the conclusions of the commission.

In this very case is demonstrated the wisdom of the Congress in requiring the proceedings of the Commission to be open. This petitioner appeared before the Ways and Means Committee, Tariff Information 1921, Part 1, Page 353, and following. He therein made the same statement that he in effect repeated before the commission on September 10th, as follows:

"When importation of dyestuffs into this country was cut off by the war, imports of nitrite of soda also ceased and our dye manufacturers found themselves without adequate supply."

He not only repeated that statement before the commission on September 10th, but emphasized the same to the extent that he claimed that his plant at Seattle had rescued the United States from this perilous position. The truth of the matter is that imports of nitrite during were greater than ever before the war; that the production of his plant was not one-sixth of the consumption of the United States during the war.

In the same statement before the Ways and Means Committee he stated: "To date we have invested something over three quarters of a million dollars." In his petition in this case before the commission he raised that amount to $1,229,500. We are advised, however, upon cross-examination, that he now reduces this amount to $250,000. Remember, this is an integral factor in the cost of production in the United States on which he has asked increase of this rate of duty to a prohibitive rate. We venture the

suggestion that when the figures constituting the $250,000 investment are exposed to examination, that they will be reduced to at least one-half of that amount!

This very case, therefore, emphasizes the wisdom of Congress in providing that evidence and testimony taken before the Tariff Commission should be under oath, should be in the presence of interested parties, who should have the right to "be heard" thereupon. It will savor, as was contemplated by Congress, of truthful facts being made the basis of our tariff data.

Now, it is respectfully suggested to the commission that it can provide reasonable rules whereby it can still avail itself of the efficiency of its many efficient agents in the field collecting testimony and data and of statements made under oath by the manufacturer or producer in his home, but that when collected before the commission the interested parties should be heard thereupon and have the right to cross-examine all witnesses, including field agents gathering this testimony as to its character and its reliability. The Board of United States General Appraisers for many years struggled with a kindred proposition until they have finally arrived at satisfactory rules whereby both importer and manufacturer can be heard under them in the matter of imports and the correctness of their invoices. There is no reason why the United States Tariff Commission can not adopt similar rules. It would but require that true trade secrets be held inviolate and confidential and would eliminate all marks of identity as to persons giving testimony in these cases. But all facts produced which are to be the basis of a new duty should be laid open to interested parties who are to be present at their taking, or at least before final acceptance by the Tariff Commission, be heard thereupon, and to offer evidence in contradiction thereof.

Respectfully submitted,

MARION DE VRIES.

Exhibit 12.

United States Tariff Commission, 8th and E Streets N. W., Washington.

Thomas O. Marvin, Chairman; William S. Culbertson, Vice-Chairman; David J. Lewis, Edward P. Costigan, William Burgess, Henry H. Glassie. John F. Bethune, Secretary.

Address reply to United States Tariff Commission.
File No. —.

October 2, 1923.

De Vries & Doherty,
Southern Building,
Washington, D. C.

DEAR SIRS:

The United States Tariff Commission has considered motions submitted by you at the public hearing on September 26, 1923, in the investigation under the provisions of Section 315 of the Tariff Act of 1922, in respect to Sodium Nitrite.

There is inclosed herewith for your information and guidance a certified extract from the minutes of the Tariff Commission showing the action of the Commission in ruling upon the motions referred to as submitted by Judge De Vries.

A copy of the Commission's action is being communicated to other parties interested in this investigation.

Very truly yours,

JOHN F. BETHUNE,
Secretary.

Inclosure.

Indorsed: U. S. Customs Court. Exhibit 12. No. 92852-G. Date: 1/24, 1930. S. C. H., Reporter.

Extract from the Minutes of a Meeting of the United States Tariff Commission October 2, 1923.

Present: Commissioners Marvin, Culbertson, Lewis, Costigan, Burgess, and Glassie.

Voted: That upon the requests made by counsel for the Norwegian Nitrogen Products Company on September 26, 1923, at the Public Hearing in the investigation (No. 7) under the provisions of Section 315 of Title III of the Tariff Act of 1922, in respect of Sodium Nitrite, the Commission rules as follows:

1. The Commission, in addition to holding a public hearing in which Judge De Vries participated as counsel for the parties of record represented by him, has submitted to the parties appearing at such hearing a written statement embodying the result of the Commission's field investigations. At the adjourned hearing, set for October 6, 1923, all parties interested, including those represented by Judge De Vries, will have an opportunity to meet the matter embodied in such statement. In so far as the first request of Judge De Vries is a request for leave to inspect the original and primary data collected by the Commission's investigators in the field and embodied in such statement, or is a request for additional information respecting the same beyond what the Commission has already submitted, the request is denied.

2. At the adjourned public hearing, set for October 6, 1923, opportunity will be afforded all parties interested to offer any evidence they may have with respect to the matter embodied in the Commission's statement of the field investigations conducted by its staff and such parties will have opportunity to be heard upon the same. In so far as the second request of Judge De Vries is a request to offer evidence and to be heard upon the question of the cost of power in the United States for the production of nitrites and to offer evidence and to be heard in respect of the matter embodied in the statement submitted by the Commission to the parties, the request is granted. In so far as it is a request to inspect the original cost and other data collected in the field by the Commission's investigators or the figures showing the details of individual costs of production obtained by the Commission under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

3. At the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession with respect to the number of laborers employed and the wages

paid by the American Nitrogen Products Company. To this extent the third request of Judge De Vries is granted; but in so far as that request asks for inspection of the original data showing the production costs in respect of labor of the American Nitrogen Products Company submitted by or obtained from said Company under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

4. At the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession with respect to capital invested in the American Nitrogen Products Company. To this extent the fourth request of Judge De Vries is granted; but in so far as that request asks for inspection of the original data relating to the production costs of the American Nitrogen Products Company submitted by or obtained from said Company under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

5. The fifth request of Judge De Vries, in so far as it asks for an opportunity to cross-examine experts of the Commission with respect to the costs data and other matter obtained by them in the course of the investigation in the field, is denied. But at the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession, and to be heard, with respect to the matter embodied in the Commission's statement heretofore submitted to the parties interested appearing in such investigation. In so far as the fifth request of Judge De Vries is a request for an opportunity to meet, by evidence and argument, the matter embodied in such statement, the request is granted. In so far as it is a request to cross-examine the Commission's investigators concerned in obtaining the matter summarized in said statement with respect to the performance of their official duties and functions in such investigation, and in so far as it is a request for inspection of the cost data and other matter so obtained and embodied in said statement, said request is denied.

A true copy.

JOHN F. BETHUNE,
Secretary.

Exhibit 13.

De Vries, Doherty, Davis & Lamb, Counsellors-at-Law,
Southern Building, Washington, D. C.

Telephone: Main 2688.

Washington Office: Marion De Vries, Thomas J. Doherty, George Roscoe Davis, George F. Lamb, Jesse P. Crawford; George F. De Venny.

New York Office: 120 Broadway.

April 19, 1924.

Hon. Thomas O. Marvin,
Chairman U. S. Tariff Commission,
Washington, D. C.

DEAR MR. CHAIRMAN:

Enclosed herewith please find copy of a letter under date line of April 19, 1924, addressed to the President of the United States in the matter of the application of the American Nitrogen Products Company before the United States Tariff Commission for an increase of duty upon nitrite.

The enclosure is transmitted to you for yourself and the Commission as advisory of its transmittal to the President, and also in protest of any action upon the part of the Commission, in transmitting any report to the President upon the subject matter of nitrite, involved in said proceeding prior to final adjudication of the mandamus proceeding now pending in the Supreme Court of the District of Columbia.

Very respectfully yours,

MARION DE VRIES.

MDeV:HC.
(Encl.)

Indorsed: U. S. Customs Court. Exhibit 13. Prot. No. 92852-G. Date: 11/24, 1930. S. C. H., Reporter.

Received in my office May 6, '24.
H. C. K.

Indorsed: U. S. Customs Court. Exhibit 13. Prot. No. 92852-G. Date: 11/24, 1930. S. C. H., Reporter.

April 19, 1924.

To the President,
The White House,
Washington, D. C.:

DEAR MR. PRESIDENT:

Some time since I addressed you upon the subject of the application by the American Nitrogen Products Company of Seattle for an increase in the rate of duty upon nitrite. The reason prompting that letter was current reports of reliable character that you had been appealed to, to direct the United States Tariff Commission to send you the result of their investigations upon the subject-matter, while there was, as there still is, pending in the Supreme Court of the District of Columbia a proceeding to require the said Commission to grant opposing parties certain legal rights claimed to have been denied them by that Commission in said proceeding. Receipt of said letter and the data accompanying the same not having been acknowledged I deem it my duty to my clients, lest the same may have been mislaid, to again address you upon the subject.

It is my opinion that any action by the United States Tariff Commission in certifying to you the results of their investigations upon that subject-matter before the Supreme Court of the District of Columbia has exhausted its jurisdiction with reference thereto would be in contempt of court. I feel that you will agree with me that while a matter is pending in any court and before final judicial conclusion thereupon, any action by any party which will deny the court the power to enforce final judgment and thereby take out of the jurisdiction of the court the subject-matter of the proceeding so as to make a possible judgment a nullity and unenforcible would be in contempt of that court. The Supreme Court of the United States in Bessette *vs.* Conkey Company, 194 U. S., 324, 327, stated:

"The purpose of contempt proceedings is to hold the power of the court *and also to secure to suitors therein the rights by it awarded.*"

No one will question that the removal of a subject-matter the subject of a proceeding in a court beyond the jurisdic-

tion of the court so that "the rights by it awarded" to one of the suitors by final decree is clearly within this definition.

Not only would the action be in contempt of court but it would be unwarrantable and inexcusable deprivation of the rights of the successful parties in such a proceeding.

The said proceeding consists in an application for a writ of mandamus. An alternative writ has been directed to the United States Tariff Commission directing that they show cause why they should not grant the interested parties certain rights in said investigation. Return was made to that writ. Thereupon demurrer was filed to the return of the Commission. The demurrer has been argued, submitted and overruled. In the present status the case will either be set down for trial so as to present all the facts involved, as well as the law, or an appeal will be taken to the Court of Appeals of the District of Columbia from the decision upon the demurrer. As counsel for the interested parties I beg to advise you, that one of these proceedings will certainly be promptly taken. The case is still within the jurisdiction of the Supreme Court of the District of Columbia for any and all of said purposes.

The interested parties appearing are importers. They are domestic representatives of a foreign manufacturer of a friendly nation engaged in trade with the United States. I do not believe it will be the wish of the Executive of this country to deny these foreign manufacturers the statutory rights accorded them or the remedies afforded them by the courts of the United States by taking from the jurisdiction of those courts before the proceedings are completed the subject-matter of a particular litigation whereby they will be denied any effective judgment they may secure, or "the rights by it awarded."

Furthermore, while nominally the interested parties appearing in this proceeding is a corporation, incorporated under the laws of the State of New York, and an agent of said foreign manufacturing concern, its application to this court represents the interests of the great consuming public of the United States. It is in opposition to an effort before the United States Tariff Commission and thereafter the Executive to increase the rate of duty upon nitrite, from 3 to 4½ cents per pound. Nitrites are principally

used in the making of azo dyes. Azo dyes are used in dyeing the wearing apparel household furnishings and other articles of use in almost every household in the United States. This increase of duty will accordingly be a practically prohibitive rate of duty upon this article so used. The only concern complaining and actuating this proceeding, the record in the case will show, employs approximately sixteen men and has an invested capital of no more than $150,000. Moreover, that plant employs the arc-fixation process, a process for the production of nitrites which an eminent Commission of the War Department of the United States, after examining every plant in the world and the costs of production therein, *including that of the American Nitrogen Products Company at Seattle*, has reported the arc-fixation not a commercially feasible process for the production of nitrogen in the United States. See Report on the Fixation and Utilization of Nitrogen, prepared by the Nitrate Division, Ordnance Office, War Department 1922. There are other manufacturers of nitrite in the United States but they employ different processes and are not parties to this proceeding and are not complaining of the existing rate of three cents per pound upon nitrite.

Wherefore, it is respectfully submitted, that there is no warrant in law or fact for either the United States Tariff Commission in violation of the jurisdiction of the court to precipitately rush this case to the Chief Executive or for the Executive to make proclamation thereupon against the interests of all the consuming public of the United States and in violation of the legal rights of citizens of a friendly country proceeding in the courts of the United States.

When the United States Tariff Commission wa by Congress first created, one of the criticisms thereof was that it would be used by the party in power to put in force and effect highly protective and prohibitive rates of duty. While that criticism ordinarily would be unjustified, any action in the present case by either the United States Tariff Commission or the Executive to rush this case out of the Commission and to secure precipitate action by the Executive, while the rights of respective parties remain undetermined and within the jurisdiction of a court of the United States, would undoubtedly justify this stated criticism.

Wherefore, Mr. President, since the Tariff Commission is but the agency of the Executive in this proceeding this communication is to most respectfully but earnestly protest against any action upon the part of the Commission or the Chief Executive of the Nation, in taking or permitting any action to be taken, which will deprive the consumers of the country and a citizen of a foreign and friendly nation of due adjudication of their rights in a court of the United States.

Most respectfully yours,

MARION DE VRIES,
Attorney for Norwegian Nitrogen Products Company of New York.

MDeV:HC.

Exhibit 14.

The White House, Washington.

April 21, 1924.

My Dear Judge De Vries:

Your communication of April 15th, to the President, with relation to the application for an increase in the rate of duty upon nitrite, has been received and will be brought to his attention at the earliest possible moment.

Sincerely yours,

C. B. SLEMP,
Secretary to the President.

Hon. Marion De Vries, Southern Building, Washington, D. C.

Indorsed: U. S. Customs Court. Exhibit 14. No. 92852G. Date: 11/24, 1930. S. C. H., Reporter.

Exhibit 15.

Indorsed: U. S. Customs Court. Exhibit 15. No. 92852G. Date: 11/24, 1930. S. C. H., Reporter.

WASHINGTON, D. C., March 24, 1924.

To the President,
Washington, D. C.

DEAR MR. PRESIDENT:

Creditable information has come to this office that the State of Washington Delegation in Congress, and others, have made representation to you to direct the United States Tariff Commission to make report under the provisions of Section 315 of the Tariff Act of 1922 (The Flexible Tariff), upon the differences in the cost of production of nitrite in the United States as compared with that in foreign countries.

As the legal representative of the Norwegian Nitrogen Products Co., Inc., importers of nitrite and therefore "interested parties," we feel it our duty in opposition thereto, to adivse you of the following facts. Perhaps they may have been brought to your attention before. In any event duty to our clients requires that they should be registered in ample form.

Soon after the enactment of the Flexible Provisions of the Tariff Act of 1922, the American Nitrogen Products Company of Seattle, Washington, made application to the United States Tariff Commission for an increase of the rate of duty on nitrite provided in the Tariff Act of 1922, to wit, three cents, to four and one-half cents. In due course that application, at least that subject-matter, was noticed for public hearing by the said Commission.

Thereat the Norwegian Nitrogen Products Co., Inc., appeared in opposition to any increase of said rate of duty.

At said hearing the said Norwegian Nitrogen Products Co., Inc., was denied by the said Commission certain claimed legal rights allowed it by the provisions of said Act. To enforce said rights and to compel said Commission to grant the same the Norwegian Nitrogen Products Co., Inc., made application to the Supreme Court of the District of Columbia for a writ of mandamus to compel the same. An alternative writ was duly granted and served upon said Commission requiring them to show cause why said claimed rights should not be granted. Thereby the said Commission was brought within the jurisdiction of said court upon said sub-

ject-matter. Decision has not as yet been rendered by said Court therein.

By reason of the aforesaid circumstances, however, the said Commission and subject-matter are now within the jurisdiction of said court, and, in the opinion of the writer, any report by said Commission to the Executive upon said subject-matter, while said matter is pending in said court and the appellate process therefrom would be in violation of the orders of said court in that it would divest it and the courts appellate therefrom of jurisdiction of the subject-matter. In the opinion of the writer such would be the subject-matter of contempt of said court in that it would divest said court of and interfere with said court in the exercise of its jurisdiction of the subject-matter.

It is not assumed, for one moment, that the Executive, in view of the circumstances, would wish to become a party to the divestiture of the jurisdiction of said court of said subject-matter while said proceedings are pending either in the Supreme Court of the District of Columbia or in any of the appellate courts to which said proceeding may be appealed whichever way decision may be rendered.

Furthermore, as a representative of the Norwegian Nitrogen Products Co., Inc., in this proceeding, the undersigned herewith submits a copy of the brief of said company filed in said court before the said Commission. It is respectfully submitted that a careful perusal of said brief will convince the Chief Executive of the Nation that the petitioned increase in the duty laid upon nitrite imported into the United States is of exceedingly questionable merit. At least it is of such very questionable merit that the extraordinary action requested of the Chief Executive of the Nation should not be, under any circumstances, undertaken or had.

It is due said Commission to say the undersigned is assured by the Chairman thereof that it is not the purpose of said Commission to certify said case to the Executive while said court proceedings are pending though requested so to do by said American Nitrogen Products Company of Seattle, Washington.

Very respectfully submitted,

MARION DE VRIES,
Attorney for Norwegian Nitrogen Products Co., Inc.

DE VRIES, DOHERTY, DAVIS AND LAMB,
Of Counsel.

Exhibit 16.

United States Tariff Commission, Washington.

Sodium Nitrite.

Report of the United States Tariff Commission to the President of the United States.

Differences in Costs of Production of Sodium Nitrite in the United States and in Competing Foreign Country, as Ascertained Pursuant to the Provisions of Section 315 of Title III of the Tariff Act of 1922.

With Appendix.

Proclamation by the President.

Washington, Government Printing Office, 1924.

Indorsed: U. S. Customs Court. Exhibit 16. Prot. No. 92852-G. Date: 11/24, 1930. S. C. H., Reporter.

United States Tariff Commission.

Investigation of the Differences in Costs of Production of Sodium Nitrite.

To the President:

The United States Tariff Commission respectfully submits the following report upon an investigation of the differences in costs of production of sodium nitrite in the United States and in competing foreign countries for the purposes of section 315 of Title III of the Tariff Act of 1922.

Introductory.

Reference to Files.—This report is based upon the following documents, which are available for reference in the files of the Tariff Commission:

File of the original documents, including the application and Expert's Preliminary Report, dated November 17, 1922.

Expert's Confidential Report to the Commission, dated September 10, 1923.

Published Summary of Information in the Matter of Sodium Nitrite, dated September 10, 1923.

Stenographic Minutes of Hearings on September 10 and 26, and October 6, 1923.

Briefs of Applicant, the American Nitrogen Products Co., through Attorneys McCumber and Sullivan, on October 6, 1923, and on October 12, 1923.

Brief of the Norwegian Nitrogen Products Co., through Attorneys De Vries and Doherty.

Advisory Board's Final Summary Report to the Commission, dated October 29, 1923.

A Proclamation by the President of the United States of America Increasing Rate of Duty on Sodium Nitrite.

Whereas in and by section 315 (a) of Title III of the act of Congress approved September 21, 1922, entitled "An act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes," it is, among other things, provided that whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in rates of duty provided in said act shown by said ascertained differences in such costs of production necessary to equalize the same;

Whereas in and by section 315 (c) of said act it is further provided that in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of said section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production

of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition;

Whereas, under and by virtue of said section of said act, the United States Tariff Commission has made an investigation to assist the President in ascertaining the differences in costs of production of and of all other facts and conditions enumerated in said section with respect to an article described in paragraph 83 of Title I of said Tariff Act of 1922, namely, sodium nitrite, being wholly or in part the growth or product of the United States, and of and with respect to a like or similar article wholly or in part the growth or product of competing foreign countries;

Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence, and to be heard;

And whereas the President upon said investigation of said differences in costs of production of said article wholly or in part the growth or product of the United States and of the like or similar article wholly or in part the growth or product of competing foreign countries, has thereby found that the principal competing country is Norway and that the duty fixed in said title and act does not equalize the differences in costs of production in the United States and in said principal competing country, namely, Norway, and has ascertained and determined the increased rate of duty necessary to equalize the same.

Now, therefore, I, Calvin Coolidge, President of the United States of America, do hereby determine and proclaim that the increase in the rate of duty provided in said act shown by said ascertained differences in said costs of production necessary to equalize the same is as follows:

An increase in said duty on sodium nitrite from 3 cents per pound to 4½ cents per pound.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this sixth day of May, in the year of our Lord one thousand nine hundred and twenty-four, and of the Independence of the United States of America the one hundred and forty-eighth.

CALVIN COOLIDGE.

By the President:

[SEAL.] CHARLES E. HUGHES,
Secretary of State.

Indorsed: United States Court of Customs and Patent Appeals. Filed Jul. 2, 1931. Arthur B. Shelton, Clerk.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Friday, February 12, 1932.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 12th day of February, A. D., 1932.

Present: The Honorable William J. Graham, Presiding Judge, and the Honorables Oscar E. Bland, Charles S. Hatfield, Finis J. Garrett, and Irvine L. Lenroot, Associate Judges.

The court was opened for business in due form.

* * * * * * *

Customs Appeal No. 3454

NORWEGIAN NITROGEN PRODUCTS COMPANY, Appellant,

v.

THE UNITED STATES, Appellee

Said appeal came on to be heard before the court and after hearing the arguments of counsel the cause was taken under advisement by the court.

Appellant granted until February 17, and appellee until February 24 to file supplemental briefs.

* * * * * * *

(Signed) William J. Graham, Presiding Judge.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

No. 3454

NORWEGIAN NITROGEN PRODUCTS COMPANY, Appellant,

v.

THE UNITED STATES, Appellee

CERTIFICATE OF IMPORTANCE

To the Honorable the Judges of said Court:

In accordance with the provisions of the Act of Congress establishing the United States Court of Customs and Pat-

ent Appeals, I hereby certify that, in my opinion, the case above-stated is of such importance as to render expedient its review by the Supreme Court of the United States in the manner provided by said Act.

This — day of ——, 1932.

(Signed) William D. Mitchell, Attorney General.

United States Court of Customs and Patent Appeals. Filed March 25, 1932. Arthur B. Shelton, Clerk.

May 2, 1932

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS,
OCTOBER TERM, 1931

Customs Appeal No. 3454. Customs Calendar No. 56

NORWEGIAN NITROGEN PRODUCTS CO., Appellant,

v.

THE UNITED STATES, Appellee

BLAND, Judge:

This is an appeal by the importer from the judgment of the United States Customs Court (one member dissenting), holding sodium nitrite to be properly dutiable at 4½ cents per pound in accordance with a proclamation of the President of the United States, T. D. 40204, 45 Treas. Dec. 642, made pursuant to the terms of section 315 of the Tariff Act of 1922.

That portion of the protest of the importer, appellant, with which we are here concerned, is grounded upon the contention that the Tariff Commission, during its investigation of production costs which preceded the proclamation of the President, did not "at any time give reasonable public notice thereof and did not afford interested parties appearing therein reasonable opportunity either to be present, or to produce evidence, or to be heard, as required by law and the rules of said Commission"; that the proceedings before the commission were null and void, which resulted in there being made no investigation of the subject

matter by the commission, and that under such circumstances the proclamation of the President is invalid and the collector's levying of duty at a rate higher than 3 cents per pound as provided for in paragraph 83 of said tariff act is unwarranted in law.

Appellant in its brief points out that the material facts in this case are fully recited in Norwegian Nitrogen Products Co. v. Tariff Commission, 274 U. S. 106, and we think the facts on which the issues here depend are there sufficiently set out, and we quote the following from the opinion in that case:

The Tariff Act of September 21, 1922, c. 356, §315, 42 Stat. 858, 941, vested in the President the power to adjust tariff duties so as to equalize differences in costs of production here and abroad of articles wholly or in part the growth or product of this country, whenever an investigation by the Tariff Commission should reveal disparate costs. Such investigation is made a prerequisite to action by the President in proclaiming changes of rates. By Executive Order of October 7, 1922, it was provided that all petitions or applications for action or relief under the so-called flexible sections of the Tariff Act of 1922 should be filed with the Tariff Commission.

In October, 1922, the American Nitrogen Products Company, a corporation of the State of Washington, filed with the United States Tariff Commission a petition praying for a fifty per cent. increase in the duty imposed by the Tariff Act of 1922 upon imported sodium nitrate. The following March, the Tariff Commission, for the purpose of assisting the President in the exercise of the powers delegated to him by the Act of 1922, ordered an investigation of the differences in cost of production of sodium nitrite at home and abroad, and of other pertinent facts and conditions. It was further ordered that all parties interested should be given an opportunity to be present and produce evidence at a public hearing to be held at a date to be fixed later.

Plaintiff in error engaged in the importation of nitrogen products into the United States which it sells on commission. It represents in the United States, as exclusive agent, the Norwegian Hydro-Electric Nitrogen Corporation, the only manufacturer of sodium nitrite in Norway. Repre-

sentatives of the Commission, in the course of its investigation, proceeded to Norway and Germany and sought from the Norwegian Company and from German manufacturers data showing the cost of production of sodium nitrite in those countries. This was refused. The Commission's experts were permitted to examine the books and records of American manufacturers, obtaining information of the domestic cost of production and other relevant data. This information was given under promise that it would be treated as confidential and upon the assurance that the rules of the Commission and § 708 of the Revenue Act of September 8, 1916, c. 463, 39 Stat. 756, 798, so required. Section 708 prohibits the Commission from revealing "the trade secrets or processes" of which it might learn in the course of its investigations.

After making its investigation, the Commission ordered a public hearing to be held on September 10, 1926. Its rules provided that: "Parties who have entered appearances shall prior to the filing of briefs, have opportunity to examine the report of the commissioner or investigator in charge of the investigation and also the record except such portions as relate to trade secrets and processes."

At the hearing, plaintiff appeared by counsel and demanded a complete copy of the application of the American Nitrogen Products Company, and attempted to cross examine its president as to its cost of production. In making these and other similar demands in the course of the hearings, plaintiff relied on the provisions of § 315 (c) of the Act of 1922, reading in part: "The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary." The Commission, holding that its action was controlled by § 708 of the Revenue Act of 1916, prohibiting it from divulging trade secrets or processes of which it acquired information in the course of investigation, excluded the questions asked and disclosed only a copy of the application of the American company, from which a statement of its costs of production had been deleted. On September 15, 1923, the Commission made a preliminary report stating the results of its inquiry. The report contained a review of the data

in the possession of the Commission, including an estimate of the cost of production in Norway, based upon such public sources in Norway as were available to it, both the Norwegian company and the plaintiff having refused to give any information on the subject. But following its settled policy, it withheld all material which would reveal the individual production costs of American manufacturers. Its practice is to publish the average domestic cost, but this was withheld here because the average cost was deemed informative of individual costs in view of the small number of American manufacturers. Hearings were resumed on September 26, at which plaintiff was given an opportunity to offer evidence, to make oral argument and to file briefs. Requests by plaintiff to cross examine the Commission's field examiners and experts and to inspect data gathered by them were refused.

The President's proclamation, which was made subsequent to the investigation hereinafter referred to and subsequent to the report to him by the Tariff Commission, contained, among other things, the following:

Whereas, under and by virtue of said section of said act, the United States Tariff Commission has made an investigation to assist the President in ascertaining the differences in costs of production of and of all other facts and conditions enumerated in said section with respect to an article described in paragraph 83 of Title I of said Tariff Act of 1922, namely, sodium nitrite, being wholly or in part the growth or product of the United States, and of and with respect to a like or similar article wholly or in part the growth or product of competing foreign countries;

Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence, and to be heard;

And whereas the President upon said investigation of said differences in costs of production of said article wholly or in part the growth or product of the United States and of the like or similar article wholly or in part the growth or product of competing foreign countries, has thereby found that the principal competing country is Norway and that the duty fixed in said title and act does not equalize the

differences in costs of production in the United States and in said principal competing country, namely, Norway, and has ascertained and determined the increased rate of duty necessary to equalize the same.

The appellant in Norwegian Nitrogen Products Co. v. Tariff Commission, supra, who is appellant in the case at bar, filed in the Supreme Court of the District of Columbia, a petition for mandamus directing the Tariff Commission to disclose the information which it had obtained concerning the cost of production, and to do other things which it had requested the Tariff Commission to do as is indicated by the above statement. The Supreme Court of the District of Columbia dismissed the petition, chiefly on the ground that under section 708 of the Revenue Act of September 8, 1916, it was made unlawful for any member of the United States Tariff Commission or employee of the same to make known trade secrets or processes of any person which the Commission had investigated.

The petitioner then appealed to the Court of Appeals of the District of Columbia and while the appeal was pending, the commission completed and submitted its report to the President. The Court of Appeals affirmed the judgment of the Supreme Court of the District of Columbia for the reason that the case had become moot by the action of the President in fixing the new rate of duty. Notwithstanding this determination, it reviewed the case at length and held substantially with the appellant's contentions in this case. The cause then went to the Supreme Court of the United States on writ of error where that court vacated the judgments of the two lower courts and remanded the cause with directions to dismiss the petition as moot.

The main consideration that brought the Customs Court to its conclusion that the proclamation was valid is that it concluded that the President had acted in all respects in accordance with the requirements of the statute and that since the President was not required to follow the findings of the commission, any irregularity in the investigation of the commission could not have the effect of invalidating his proclamation. Our decision in Clarke v. United States, 17 C. C. P. A. (Customs) 420, T. D. 43866, is relied upon as supporting authority.

While the protest raises the constitutionality of the flexible tariff provision under consideration, this issue is not pressed

here, it being conceded that Hampton, Jr. & Co. v. United States, 14 Ct. Cust. Appls. 350, T. D. 42030, and Hampton & Co. v. United States, 276 U. S. 394, settle that issue.

The contention of appellant, we think, is sufficiently indicated by what has been heretofore set out. The assignments of error raise all the questions above indicated and also challenge the correctness of the action of the court below in rejecting certain testimony and documentary exhibits offered by appellant and in granting the motion of the Government to strike out all testimony and documents which had been offered by appellant.

The Government contends that the action of the commission fully complied with the statute; that the proclamation was not subject to judicial review; that any alleged irregularities of the Tariff Commission in its investigations are not properly at issue, and that the questions presented in this appeal are not justiciable. The Government further argues that if the character of the investigation which the Tariff Commission made and the hearing which it held are to be inquired into by the court, in order to determine the validity of the proclamation, it must be found that the appellant obtained all the information and privileges to which it was entitled, and lastly argues that by reason of appellant's refusal to give the Tariff Commission information as to the cost of production and by reason of its failure to cooperate with the Tariff Commission in determining the differences in the cost of production, it had forfeited its right to claim that it did not have a proper hearing before the commission. In view of our conclusion in this case, we deem it unimportant to discuss the last contention of the Government.

We disagree with the contention of the Government that since the proclamation recites that the prerequisites of the statute had been complied with, the truthfulness of these statements cannot be inquired into in a proceeding wherein the validity of the proclamation and the validity of the tariff duty levied pursuant thereto is in question.

The decision of this case, as we see it, depends upon what force and effect is to be given the following language used by Congress in section 315 of the Tariff Act of 1922 when read in connection with the other language in the section:

Investigations to assist the President in ascertaining differences in costs of production under this section shall be

made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard.

The effect of importer's contentions, as we view them, is that a hearing or an investigation is required which is similar to and comparable with a hearing in a judicial tribunal where vital rights are at issue. The whole argument made by counsel for appellant would seem to rest upon the fact that his client had not been granted such a hearing as it was entitled to in order that its rights be protected under the due process clause of the Constitution. For a number of reasons we conclude that this position cannot be successfully defended. It is unnecessary to enumerate or to discuss all of them.

The legislative history of this particular provision is highly suggestive of the intent of the legislature. A provision inserted in the bill by the committee of the Senate that the commission be authorized to hold such hearings and to adopt such procedure, rules, and regulations as it deemed necessary for adequate investigation under this section, was amended in the Senate so as to read as follows:

The commission shall give reasonable public notice and shall give reasonable opportunity to parties interested to be present and to produce evidence and to be heard. Such hearings shall be public. Subject to the foregoing, the commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

This provision was changed in conference to the form in which it now appears in the statute. The managers on the part of the House reported (62 Cong. Rec., pt. 12, p. 12660):

The action of the conferees eliminates the provision of the Senate amendment that the Tariff Commission hearings shall be public and that the President shall make the findings, hearings, and testimony in all proceedings public as soon as practicable after the issuance of a proclamation.

It will be noticed that the provision existing in the bill when it passed the Senate, requiring that the hearings

should be public and that the President should make the findings, etc., public, was removed through the recommendation of the conferees. This would seem to imply that it was the intent of Congress by the use of the language in question to permit the commission to have hearings both public and private if it desired; that while it was obligatory upon the commission to give reasonable notice and give interested persons a reasonable opportunty to be present, to produce evidence, and to be heard, its investigations were not in the nature of the trial of an issue entitling the litigants to a full knowledge of all facts submitted, as would be required in many of the hearings referred to in the cases relied upon by appellant.

A consideration of the section as a whole, the purpose it was intended to accomplish as part of a protective tariff bill, the legislative history of the same, and a comparison of it with somewhat similar provisions in the same act leads us to the irresistible conclusion that the chief concern of Congress in enacting the particular provision in question was to ensure that the President in the performance of the responsible task entrusted to him should have the assistance of a more or less independent agency in ascertaining the facts upon which his proclamation was to depend. At the same time, the language used shows that Congress did not intend that the commission in its investigation should refuse to hear interested parties. We cannot conclude, however, that the desire of Congress to afford the President the opportunity of having an unhampered and efficient agency to assist him was subordinated to its solicitude concerning the privileges to be granted interested parties. The correctness of this conclusion becomes more apparent when viewed in the light of the fact that the rights of interested parties are not necessarily affected in the least by such investigation, since whatever is done by the commission is in no sense binding on the President, but is only intended to assist him in a matter which he alone is authorized to determine.

Since our determination of the kind of investigation the statute requires must necessarily be influenced by a consideration of the purpose of such investigation and the ultimate control it may have over the duty to be levied, it is important to consider what is required of the President and what he is privileged to do. The statute authorizes the President to ascertain the differences in the costs. It is he,

after all, who ascertains. He does not have to rely upon the evidence produced before or the recommendations made by the commission. There is nothing in the section which prevents him from making such inquiries as he deems proper or from ignoring everything that is done by the commission. While the evidence produced before the commission, and their findings, except in rare cases, would no doubt be persuasive, they, in no sense, are made binding upon him.

Appellant urges that the quoted portion of the proclamation shows conclusively that the President made no investigation but relied on the investigation of the commission. It is our view that whether the President did or did not rely, wholly or in part, upon an investigation made by himself is immaterial. Our determination of the kind of investigation intended by Congress cannot depend on whether the President does or does not avail himself of the privileges he has under the statute.

The plain, unambiguous language of the statute, however, is "and no proclamation shall be issued under this section until such investigation shall have been made." The statute further provides that at the commission's hearings in such investigation it "shall give reasonable opportunity to parties interested to be present, to produce evidence and to be heard." It seems clear to us that Congress did not wish to entrust the duty of changing tariff rates to the President without assuring that he had at his command a suitable authorized agency to make such inquiry and report such facts as might be helpful to him. Therefore, we think that such an investigation as is indicated by the provision under consideration is a condition precedent to the issuance of a valid proclamation. If no such investigation is had, the proclamation is void, and any duty levied by reason of the same is unwarranted in law. Hampton & Co. v. United States, 276 U. S. 394; Union Bridge Co. v. United States, 204 U. S. 364; William A. Foster & Co., Inc., et al. v. United States, Suit No. 3458, 20 C. C. P. A. (Customs) —, T. D. —; United States v. Fox River Butter Co., cross-appeals, Suits Nos. 3438 and 3442, 20 C. C. P. A. (Customs) —, T. D. —, the last two cases decided concurrently herewith. In a suit of this character arising upon protest, the collector's unwarranted action may be successfully challenged. Hampton, Jr. & Co. v. United States, supra; Hampton Co. v. United States, supra.

The controlling question before us is: Was there an investigation of the character prescribed by Congress? It is not denied that appellant was given the privilege of being present at the hearing; that it had the opportunity to produce all the evidence it sought to produce, and more than it was willing to produce, and no complaint is made that it was not given reasonable opportunity to be heard at length in argument. It was privileged to cross examine the chief adverse witness. The witness refused to answer some of the questions, the effect of which refusal is not before us for consideration. Appellant complains that it was denied the right to have full knowledge of all the facts obtained confidentially or otherwise by the commission, which it had the right to meet by rebutting proof and by argument. To hold that appellant was entitled to such privileges as a right granted under the provisions of the statute under consideration would be to hold that appellant's rights at the hearing are comparable to its rights in a law suit or in hearings of entirely different character, elsewhere herein referred to.

The hearing before the Tariff Commission was not a judicial inquiry. Prentis v. Atlantic Coast Line, 211 U. S. 210, 226. If the inquiry at bar when made would result in a finding which would be binding upon the President and result in a new rate of tariff duty being substituted for the old one, there would be considerable more plausibility in appellant's contention. However, we do not mean to say, even under these supposed circumstances, that the interested party has a right in a given tariff rate. No one has any legal right to the continuance of a customs duty. Indeed, he may be deprived of the right of importation entirely.

Appellant has relied upon Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, St. Louis Railway Co. v. Interstate Commerce Commission, 264 U. S. 64, and other quite similar cases as supporting its contention. These cases are not in point for the reasons we have just discussed, if for no other. The hearings before the Interstate Commerce Commission, considered in those cases, resulted in the fixing of rates which the railroads were directed to accept for their services. They involved the maintenance of definite rights which, under due process, the railroads could defend. The hearings of the Commerce Commission were not for the purpose of aiding someone

else in determining a rate which might or might not be finally fixed. The rates were based upon the facts disclosed at the hearings. This is not necessarily so in the case at bar.

We think considerable light is thrown on the question of what kind of investigation was within the contemplation of Congress by a consideration of what it was trying to do by the enactment of the flexible tariff provision. Ordinarily Congress definitely fixes tariff rates in tariff acts. When it enacted the act which included the section under consideration, it recognized that its own investigations as to the differences in production costs were necessarily very limited in their scope and that the rates it prescribed might not accurately measure the differences in such costs. Furthermore, the probability of changes in such costs was to be expected. The President was permitted only to raise or lower the duty 50 per centum and to make nothing dutiable that was free, and nothing free that was dutiable. Surely Congress did not contemplate that the investigation by the President or the Tariff Commission should be carried on under the rules of technical judicial inquiry, when its own inquiries, in trying to equalize production costs, are characterized by so little formality. An inquiry such as appellant contends for, we think would so delay and hinder the operation of the flexible provision as to almost make it useless. In the case at bar the inquiry began nearly ten years ago. If such an inquiry were required and this court in each instance were called upon to judicially review the details of such inquiry, it would be difficult for the flexible provision to accomplish its intended purpose. Our review of such hearings upon protest would be the same substantially as if Congress had provided a direct appeal to this court.

It is significant, we think, that Congress in section 316 of the same act, relating to unfair competition, provided for an investigation and for an appeal to this court on issues of law. Under that section we are authorized to review and do review questions of law arising from such investigations. Ex parte Bakelite Corp., 279 U. S. 438. If Congress had contemplated what appellant contends for here, we think it more than probable that it, in section 315, supra, would have provided for a similar review by this court.

Appellant at the trial below offered in evidence certain

documents which constitute 16 exhibits in the case. The Government objected to their admission. The documents were filed but decision as to their admissibility was reserved. At the close of the hearing the Government moved to strike out all of said documents. The court did not rule upon the Government's motion but reserved the decision on the motion, and in its decision, which is now before us, the court said:

> The testimony offered by the plaintiff is not only immaterial but incompetent to any issue involved. The objection thereto made by the Government is sustained, the motion to strike it out is granted, and an exception given to the plaintiff.

Appellant has assigned error on this action of the court below. Exhibits 1 to 16, inclusive, are as follows:

Exhibit 1. Executive Order of the President, dated Oct. 7, 1922, directed to the commission.

Exhibit 2. Rules adopted by the commission Oct. 26, 1922.

Exhibit 3. Order for investigation by commission.

Exhibit 4. Notice of public hearing.

Exhibits 5, 6 and 7. Testimony taken before commission.

Exhibit 8. Deleted copy of letter to commission by appellant's counsel.

Exhibit 9. Commission's letter to appellant's counsel enclosing summary of information compiled by commission in connection with the investigation.

Exhibit 10. Letter to appellant's counsel giving certain rules and information by the commission.

Exhibit 11. Letter from appellant's counsel to commission asking for information contained in Exhibit 10.

Exhibit 12. Commission's letter to appellant's counsel giving extract from minutes of a meeting of the commission.

Exhibit 13. Letter from appellant's counsel to commission enclosing copy of appellant's counsel's letter to the President.

Exhibit 14. Letter from White House to appellant's counsel acknowledging receipt of letter referred to in Exhibit 13.

Exhibit 15. Letter of appellant's counsel to the President.

Exhibit 16. Report of commission to the President.

If the statement in the proclamation that there had been notice and a hearing of the character prescribed by the statute is conclusive, then, of course, the court's ruling on the Government's motion was correct, regardless of the contents of the offered documents. On the other hand, if the President's proclamation is not conclusive of the things stated, then documents of the character of some of those offered might be very material, depending upon their content. For instance, a notice of a public hearing might constitute substantial evidence that there was no valid notice served. A report of the commission to the President might show affirmatively that there was no investigation of the character required by the statute. As we interpret the statute, it would have been proper for the court to have admitted any such document which had evidentiary value toward proving that the prerequisite provisions of the statute had not been complied with. United States v. S. Leon & Co., cross appeals, Suits Nos. 3487 and 3493, — C. C. P. A. (Customs) —, T. D. —, decided concurrently herewith.

We have looked over these exhibits with care and conclude that nothing is therein contained which tends to prove that there was a lack of such notice or investigation by the commission as the statute contemplates. On the contrary, most of the exhibits possess evidentiary value tending to prove that there was such notice and investigation. The appellant was not prejudiced by the court's refusal to receive them.

These exhibits were stricken out by the court below and are not to be regarded here as proof that the statutory prerequisites under consideration were complied with. No affirmative proof is necessary since, in the absence of proof to the contrary, it will be presumed that such prerequisites were complied with.

Many authorities have been cited on both sides as having bearing on the nature of the hearing and investigation before the Tariff Commission. All the many authorities cited on both sides of the case have been considered by us, but we have found it unnecessary to discuss most of them. In Londoner v. Denver, 210 U. S. 373, 386, in a case involving the nature of a hearing by the city council which the statute granted to those interested in street improvement taxes, the court said:

If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal.

While this case relates to direct taxation upon property and is not analagous to the exact issue presented here, we think that most of the quoted language used by the court might be well employed in the decision of the case at bar.

We conclude that the statutory prerequisites for the issuance of the proclamation were complied with; that the collector's levying 4½ cents per pound on the involved merchandise was warranted in law, and that the court below properly overruled the protest, and its judgment is affirmed.

Affirmed.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Monday, May 2, 1932.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 2nd day of May, A. D. 1932.

Present: The Honorable William J. Graham, Presiding Judge, and the Honorables Oscar E. Bland, Charles S. Hatfield, Finis J. Garrett, and Irvine L. Lenroot, Associate Judges.

The court was opened for business in due form.

* * * * * * *

Customs Appeal No. 3454

NORWEGIAN NITROGEN PRODUCTS COMPANY, Appellant,

v.

THE UNITED STATES, Appellee

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

Ordered that the judgment of the United States Customs Court be, and the same is hereby, affirmed.

* * * * * * *

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Customs Appeal No. 3454

NORWEGIAN NITROGEN PRODUCTS COMPANY, Appellant,

v.

THE UNITED STATES, Appellee

CERTIFICATE RE MANDATE OF COURT OF CUSTOMS AND PATENT APPEALS

The final mandate in the above-entitled appeal, consisting of a certified copy of the order of the court of the 2nd day of May, 1932, was issued to the United States Customs Court on the 8th day of June, 1932.

Arthur B. Shelton, Clerk.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Customs Appeal No. 3454

NORWEGIAN NITROGEN PRODUCTS COMPANY, Appellant,

v.

THE UNITED STATES, Appellee

CERTIFICATE OF CLERK

I, Arthur B. Shelton, Clerk of the United States Court of Customs and Patent Appeals, do hereby certify that the attached pages, numbered 1 to 217, inclusive, contain a true and complete transcript of the record and certain proceedings had in said court in the above-entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this eighteenth day of July, A. D. 1932.

Arthur B. Shelton, Clerk. (Seal of the United States Court of Customs and Patent Appeals.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 17, 1932

The petition herein for a writ of certiorari to the U. S. Court of Customs and Patent Appeals is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.